IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-5685

DAISY JOHNSON, DOROTHY MILLER, FORESTINE PRESSY, individually and on behalf of their minor children and on behalf of all others similarly situated,

Plaintiff-Appellants,

—against—

NEW YORK STATE EDUCATION DEPARTMENT, EWALD B. NYQUIST, as Commissioner of the New York State Education Department, and the BOARD OF EDUCATION OF UNION FREE SCHOOL DISTRICT No. 27, Town of Hempstead,

Defendants-Appellees.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

INDEX

	Page
Chronological List of Relevant Docket Entries	1
Complaint	3
Order to Show Cause—Re: Preliminary and Permanent Injunctions and Convening of a Statutory Three Judge Court	15
Affidavit of CARL JAY NATHANSON in Support of Order to Show Cause	17

Page

Affidavit of DAISY JOHNSON 22

Affidavit of DOROTHY MILLER 24

Affidavit of FORESTINE PRESSY 26

Affidavit of CARL JAY NATHANSON 28

Affidavit of DR. GERALD G. GLASS 31

Answer of the BOARD OF EDUCATION of UNION FREE SCHOOL DISTRICT NO. 27, and EDWARD MOYER 34

Affidavit of DONALD SISKIND in Opposition to Plaintiffs' Motion 37

Affidavit of EDWARD MOYER in Opposition to Plaintiffs' Motion 41

Decision and Order, Denying Plaintiffs a Three-Judge Court and Dismissing Plaintiffs' Complaint (Travia, J.) 42

Opinion and Dissenting Opinion of Court of Appeals 59

Letter from Helen Seneskey, Principal to Parents dated August 31, 1970 (Appended to Plaintiffs' Complaint) 82

Fee Schedule—Textbook Rental—West Hempstead Public Schools (Appended to Plaintiffs' Complaint) 83

Letter from Benedict J. Valentine, Principal to Parents. (Appended to Affidavit of Plaintiff FORESTINE PRESSY) 84

Order of the Supreme Court of the United States granting motion for leave to proceed in forma pauperis and granting petition for writ of certiorari 86

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
September 16, 1970	Plaintiffs' Complaint filed in United States District Court for the Eastern District of New York and Summons Issued
September 22, 1970	Order to Show Cause—Ordered that Defendants show cause in Courtroom No. 9 on September 25, 1970 at 10:00 A.M. why a Temporary Restraining Order should not issue pending the Hearing of Plaintiffs' Motion for a Preliminary and Permanent Injunction. Travia, J.
September 22, 1970	Plaintiffs' Memorandum of Law in support of their Motion
September 25, 1970	Affidavit of CARL JAY NATHANSON in support of Plaintiffs' Motion
September 28, 1970	Affidavit of DONALD J. SUSKIND in opposition to Plaintiffs' Motion
September 28, 1970	Affidavit of EDWARD MOYER in opposition to Plaintiffs' Motion
September 30, 1970	Memorandum of Defendants NEW YORK STATE EDUCATION DEPARTMENT and EWALD B. NYQUIST in opposition to Plaintiffs' Motion to Convene a Three-Judge Court.
October 7, 1970	Supplemental Memorandum of Law on behalf of Defendant NEW YORK STATE EDUCATION DEPARTMENT and EWALD B. NYQUIST

DATE	PROCEEDINGS
October 9, 1970	Summons and return. Defendants NEW YORK STATE EDUCATION DEPARTMENT and EWALD B. NYQUIST served on 9/22/70; Defendants BOARD OF EDUCATION OF UNION FREE SCHOOL DISTRICT NO. 27 served on 10/7/70
October 10, 1970	Answer of Defendants BOARD OF EDUCATION OF UNION FREE SCHOOL DISTRICT NO. 27 and EDWARD MOYER, Superintendent, filed
October 13, 1970	Plaintiffs reply Memorandum of Law filed in support of Application to Convene a Three-Judge Court.
October 28, 1970	Memorandum decision and Order, Travia, J. Ordered Plaintiffs' Motion is in all respects denied and that the Complaint be dismissed
November 5, 1970	Plaintiffs' motion for Leave to Appeal in Forma Pauperis
November 5, 1970	Plaintiffs' Notice of Appeal filed
November 20, 1970	Order entered granting Plaintiffs Leave to Appeal in Forma Pauperis. Travia, J.
June 16, 1971	Appeal argued. Kaufman, C.J., Moore, J. Timbers, J.
August 13, 1971	Opinion and Dissenting Opinion and Judgment of the Court of Appeals for the Second Circuit
November 6, 1971	Petition for Certiorari filed
November 12, 1971	Certified Record on Appeal to the United States Supreme Court
February 22, 1972	Certiorari granted

IN UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

COMPLAINT

I

Plaintiffs, on behalf of themselves and all other persons similarly situated, seek a declaratory judgment that New York Education Law, Section 701 is in violation of the Fourteenth Amendment to the Constitution of the United States insofar as said section has the effect of denying plaintiffs equal protection of the law.

Plaintiffs seek to enjoin any action under the aforesaid Statute which denies free text-books to all the pupils in Union Free School District No. 27 in grades one to six, while providing free text-books to all pupils in grades seven to twelve.

II

PRELIMINARY STATEMENT

In 1965, the New York State Legislature, amended Section 701 of the Education Law (Laws 1965, c. 320) to require local public school authorities to lend text-books free of charge to all pupils in grades seven through twelve. No such automatic provision of free text-books is made for children in grades one through six. Instead, § 703 authorizes the qualified voters of local school districts to vote a tax, and if voted, requires the local school board to purchase and furnish free, text-books to all pupils in grades one through six attending the schools in said district. The Legislature enacted the above provision based on findings that "public welfare and safety require that the state and local communities give assistance to educational programs which are important to our national defense and the general welfare of the state." (New York Sessions Laws, 1965, c. 320 § 1).

The Board of Education of Union Free School District No. 27, Town of Hempstead, following rejection by the voters of the proposed 1970-1971 school budget, notified the plaintiffs and other parents that pupils in the ele-

mentary schools would have to pay a fee for text-books, work-books, duplicating paper, miscellaneous supplies and materials. Each child in grades 1, 2, 3, and 4, $17.50; and each child in grades 5 and 6, $15.50. Text-books have been distributed free to pupils in grades seven through twelve. Children unable to pay the text-book fee have been denied text-books and supplies by the West Hempstead Public Schools.

Section 701 of the Education Law is in violation of the equal protection provisions of the Fourteenth Amendment to the United States Constitution and causes serious and irreparable harm to plaintiffs' children and all other children similarly situated. Specifically, as hereinafter more fully set forth, the New York Education Law unreasonably, irrationally and arbitrarily creates two classes of pupils, those in grades seven to twelve who will receive free text-books and those pupils in grades one through six who, absent approval of a tax by voters in the district, must pay for text-books. Under the New York Law, the only distinction between the pupils who receive free text-books and those who must pay for text-books is the grade of the pupil. The classification is without any reasonable basis and denies equal educational opportunity to pupils in grades one through six unable to purchase text-books. Likewise, the arbitrary conditioning of plaintiffs' children's right to text-books upon approval by a local tax assessment vote, while providing text-books automatically to other children, is invidious and a denial of equal protection of the law.

As implemented, the Education Law specifically permits and authorizes the requirement of a fee for text-books levied by local school districts upon parents of children in grades one through six. Plaintiffs, recipients of public assistance, are indigent and cannot pay that fee. Their children are hence being denied essential text-books, which are nonetheless available to other similarly situated but more wealthy children, and hence receive a significantly inferior education solely because of plaintiffs' indigency. As such, plaintiffs are hence denied equal protection of the laws.

III

JURISDICTION

The jurisdiction of the Court is based upon:

a) Title 28 U.S.C. §§ 1331, 1337 and 1343

b) Title 28 U.S.C. §§ 2201 and 2202

c) Title 42 U.S.C. §§ 1983 and 1988

d) United States Constitution, the Fourteenth Amendment.

The amount in controversy, exclusive of interests and cost, exceeds $10,000.00.

IV

THREE JUDGE COURT

A three judge District Court is required to be convened pursuant to Title 28 U.S.C. §§ 2281 and 2284 in that plaintiffs seek a permanent injunction restraining the enforcement, operation and execution of New York Education Law § 701, *et seq.* by the defendants by reason of its repugnance to the Constitution of the United States.

V

STATEMENT OF CLAIM

1. New York State in its Constitution mandates that "The Legislature shall provide for the maintenance and support of a system of free common schools wherein all the children of this state may be educated." New York Constitution, Art. XI, § 1. Attendance of "minors from six to sixteen years of age" upon full time day instruction is compulsory. New York Education Law 3205.

2. Pupils over five and under twenty-one years of age are entitled to attend the public schools in the district or city of their residence without the payment of tuition. New York Education Law § 3202, subdivision 1.

3. In 1965, the New York Legislature amended § 701 of the Education Law of the State of New York and required local school districts, beginning with the year 1966-1967, to purchase text-books and lend them without charge "to all children residing in such district who are enrolled in grades seven to twelve of a public or private school which complies with the compulsory education law." New York Education Law § 701, subdivision 1, 2, and 3, provides as follows:

> "1. In the several cities and school districts of the state, boards of education, trustees or such body or officer as perform the functions of such boards, shall designate text-books to be used in the schools under their charge.
>
> 2. A text-book, for the purposes of this section shall mean a book which a pupil is required to use as a text for a semester or more in a particular class in the school he legally attends.
>
> 3. In the several cities and school districts of the state, boards of education, trustees or such body or officers as perform the function of such boards shall have the *power and duty to purchase and to loan upon individual request, to all children residing in such district who are enrolled in grades seven to twelve of a public or private school which complies with the compulsory education law, text-books.* Text-books loaned to children in grades seven to twelve of said private schools shall be text-books which are designated for use in any public, elementary or secondary schools of the state or are approved by any boards of education, trustees or other school authorities. Such text-books are to be loaned free to such children subject to such rules and regulations as are or may be prescribed by the board of regents and such boards of education, trustees or other school authorities." (Emphasis added).

4. The qualified voters of any school district shall have the power to vote a tax for the purchase of text-books used by pupils enrolled in grades one to six inclusive.

The New York Education Law, § 703, subdivision 2, provides as follows:

> "If such tax shall be voted, it shall be the duty of the board of education or trustees of such district, within ninety days thereafter, to purchase and furnish free, text-books to all the pupils in grades one through six inclusive attending the schools in such district. Such board of education or trustees shall have power to establish such rules and regulations concerning the use by the pupils of such text-books, and the care, preservation and custody thereof as it shall deem necessary. L. 1947, c. 820; amended L. 1950, c. 239, § 3; L. 1965, c. 320, § 3, eff. Sept. 1, 1966."

5. In June, 1970, the qualified voters of Union Free School District No. 27, commonly referred to as the West Hempstead Public Schools, rejected the school budget which included provision of text-books to children in grades one through six.

6. On August 31, 1970, the defendant school board, by letter, a copy of which is annexed as Exhibit "A", notified the plaintiffs and other parents that the defendant school board would be operating on an austerity budget and that all pupils in grades kindergarten to 6th grade would have to pay for text-books, work-books and other school materials. A copy of the schedule of fees is annexed and marked Exhibit "B".

7. The fees for text-books per pupil in the elementary school are as follows:

	Text-books Per Pupil (rental)
Grades 1, 2, 3, 4	$7.50
Grades 5, 6	7.50
Grades 7, 8, 9, 10, 11, 12	Free

8. The fees were due and payable on the first day of school. Children who did not bring the fees demanded were denied text-books, work-books and other required materials.

9. The defendant School Board, pursuant to the provisions of the Education Law, § 701, provided free text-books to all pupils in grades seven through twelve on the first day of school.

10. The provisions of New York Education Law, § 701 is in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution in that the State has arbitrarily and unreasonably created two classes of pupils, those in grades seven to twelve, who will receive free text-books, and those in grades one through six, who must pay for text-books. That text-books, which are critical to the teaching process, are denied to children whose need is equal to those in grades seven to twelve but whose parents are unable to pay the requisite fee. Unless this Court declares the aforementioned provisions unconstitutional and enjoins implementation thereof, the pupils attending first to sixth grades, who lack funds to purchase text-books, suffer permanent and irreparable damage by being denied an education.

VII

PLAINTIFFS

(1) (a) Plaintiffs are all adult citizens of the United States and reside in Nassau County within Union Free School District No. 27, in the Town of Hempstead. Plaintiffs bring this action pursuant to Rule 23 of the Federal Rules of Civil Procedure on their own behalf and on behalf of their children and all other persons similarly aggrieved by the implementation of New York Education Law § 701.

(b) Plaintiffs are members of a class of recipients of public assistance who are parents of children attending defendant School Board's school in the first to the sixth grades and who have been denied free text-books which have been provided free by said board to pupils in grades seven to twelve and who are now denied any text-books because of their indigency.

(c) Plaintiffs bring this action as a class action because the questions of fact and law are common to the

plaintiffs and the class they represent; the members of the class are so numerous as to make joinder of parties impracticable; the claims of the plaintiffs are typical of the claims of all members of the class; the plaintiffs fairly and adequately represent the claims of all the members of the class, and class action will best provide for a fair and efficient adjudication of this controversy.

(2) (a) Plaintiff DAISY JOHNSON is a recipient of public assistance and resides in the Town of Hempstead, New York. She is the mother of four children attending the West Hempstead Public Schools. Herron Johnson, age 8, is in the third grade at the Marion Deloney Primary School; Reberick Johnson, age 6, is in the second grade at the same school; Roderick Johnson, age 5, is in the first grade at the Deloney Primary School and Zena Johnson, age 5, is in the kindergarten at the Chestnut Primary School. All the children were denied free text-books by the defendant School Board and asked instead to pay a fee for rental of the required books, totaling $58.50. The plaintiff DAISY JOHNSON lacks funds to purchase said text-books and the children are without text-books required for their daily instruction.

(b) Plaintiff DOROTHY MILLER is a recipient of public assistance and resides in the Town of Hempstead, New York. She is the mother of Sheshonia Miller, age 5, who attends kindergarten at the Marion Deloney Primary School. On the first day of school she was denied free text-books by the defendant board and instead was asked to pay a fee of $6.00. She does not have the fee demanded and is without the text-books required for daily instruction.

(c) Plaintiff FORESTINE PRESSY is a recipient of public assistance and resides in the Town of Hempstead, New York. She is the mother of Paulette Pressy, age 6½, who attends the second grade at the Deloney Primary School. On the first day of school Paulette was denied free text-books and asked to pay a rental fee of $17.50. She was unable to pay the fee and denied the text-books required for instruction.

VIII

DEFENDANTS

(1) The defendant NEW YORK STATE EDUCATION DEPARTMENT, under New York Education Law § 101, has primary responsibility for the general management and supervision of all public schools and all of the educational work of the State of New York in accordance with the Education Law of New York, and the Constitutions of New York and the United States.

(2) Defendant EWALD B. NYQUIST, as Commissioner of the New York State Department of Education, has primary responsibility for the supervision over all schools and advises and guides the school officers of all districts in relation to their duties and management of schools under their control. As the Chief Executive Officer of the State system of education, he is under a duty to enforce all general and special laws relating to the educational system of the State of New York. *Education Law § 305.*

(3) Defendant BOARD OF EDUCATION OF UNION FREE SCHOOL DISTRICT NO. 27, Town of Hempstead, is a corporate body responsible for the required instruction of pupils residing in its district and has the supervision, management and control of the educational affairs of the district. *Education Law § 1709.*

(4) Defendant EDWARD MOYER, as Superintendent of the schools in Union Free School District No. 27, Town of Hempstead, is the Chief Executive Officer of the school district and has primary responsibility for the administration of the schools in compliance with law. *New York Education Law § 1711.*

IX

AS A FIRST CAUSE OF ACTION

1. Section 701 of the Education Law violates and is repugnant to the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. By

requiring free text-books to those pupils in grades seven to twelve and denying free text-books to pupils in grades one to six, § 701 invidiously discriminates against plaintiffs and all others similarly situated, by creating an arbitrary irrational and discriminatory classification which deprives plaintiffs and members of their class of equal protection of law and an adequate education.

X

AS A SECOND CAUSE OF ACTION

1. Plaintiffs restate and reallege each and every allegation contained in Sections I-VIII, *ante*.

2. Under the Constitutions of the United States and the State of New York, the right to education is fundamental to every citizen's opportunity in life and includes all essential materials recognized by the State as being basic to learning.

3. A necessary component of education is the furnishing of text-books to all children. Without such text-books, a child's participation in the school curriculum, class discussion and academic activities is severely handicapped and irreparably impaired.

4. Under the Education Law, §§ 701 and 703, educationally required text-books are furnished automatically to all children except those in grades one through six. Such younger children's basic right to books necessary for education is subjected to the arbitrary condition of a local school district tax assessment vote, while no such condition is imposed on older children's right to needed books.

5. The imposition of the special procedural requirement of obtaining a majority of voters' approval in a local school district tax assessment vote in order to receive text-books without charge while all other school age children receive text-books automatically free of charge, is a denial of equal educational opportunity and equal protection of the laws under the Fourteenth Amendment to the United States Constitution.

XI

AS A THIRD CAUSE OF ACTION

1. Plaintiffs restate and reallege each and every allegation contained in Sections I-VIII, *ante*.

2. Pursuant to the aforesaid statutory provisions of the Educational Law, text-books, recognized by the State as essential to obtaining a decent education, are provided to plaintiffs' children in grades one through six only upon payment of a designated fee.

3. As indigent parents with a basic public assistance grant which includes no allowance for school books, plaintiffs are unable to afford to pay this fee and their children are forced to accept text-book-less education.

4. Plaintiffs' children are by definition educationally deprived due to their poverty and, therefore, least able to survive with injury and such deprivation when it is imposed upon them.

5. In providing the basics of education only to those children who can afford to pay the fee charged, and in withholding them from children unable to pay because of indigency, defendants are denying plaintiffs equal educational opportunity and equal protection of the laws under the Fourteenth Amendment to the United States Constitution.

XII

Text-books are the structural backbone to classroom learning in school. No rational purpose exists for the implemented statutory discrimination which denies these books to children in grades one through six:

(a) Such younger children have an equal or greater need for educational materials, most critically text-books, as do their older counterparts who are similarly situated, in seeking education. Mere longevity or level of sophistication in reading bear no relation to a child's actual need for text-books. Early exposure to written materials is vital to later development. Without text-books, plaintiffs' children, in their formative years, are falling behind, and will continue to fall behind, other children who are

ERRATA - PAGE 13 APPENDIX

2. Enter preliminary and permanent injunctions enjoining the defendants, their successors in office, agents and employees, from enforcing or implementing New York Education Law §701 insofar as it denies free text-books to those pupils in first through sixth grades, while requiring free text-books for pupils in grades seven to twelve, on the ground that said classification is arbitrary, irrational and discriminatory in violation of the equal protection clause of the Fourteenth Amendment to the United States Constitution.

now being provided them or who are able to afford them. Should text-book deprivation continue to be visited upon the younger children in early years of development, by the time grade seven is reached, the prior impairment of reading, writing and comprehension skills will render useless and meaningless their then acquired right to seventh grade text-books. Provision, then, of seventh grade text-books to children learning at fifth grade levels because of prior text-book deprivation is irrational, invidious, and cruel in the extreme.

(b) Indigent children sitting, bookless, side by side in the same classroom with other more wealthy children learning with purchase text-books engenders a widespread feeling of inferiority and unfitness in poor children and is psychologically, emotionally and educationally disastrous to their well-being.

Plaintiffs have no adequate remedy at law. Defendants will continue to cause, and threaten to cause, irreparable injury unless enjoined forthwith.

WHEREFORE, plaintiffs, on behalf of themselves and all others similarly situated, respectfully pray:

1. That a three judge District Court be convened to determine this controversy pursuant to Title 28 U.S.C., §§ 2281 and 2284.

2. Enter preliminary and permanent injunctions enjoining the defendants, their successors in office, agents and employees, from enforcing or implementing New York Education Law, § 701 insofar as it denies free text-books to those pupils in grades seven to twelve, on the ground that said classification is arbitrary, irrational and discriminatory in violation of the equal protection clause of the Fourteenth Amendment to the United States Constitution.

3. Enter a declaratory judgment declaring New York Education Law, § 701, *et seq.* unconstitutional in violation of the Fourteenth Amendment to the United States Constitution.

4. Allow plaintiffs their costs herein and grant them and all other persons similarly situated such additional

or alternative relief as the Court may deem to be just and appropriate.

Respectfully submitted,

LEONARD S. CLARK
By: CARL JAY NATHANSON
BURR C. HOLLISTER
Of Counsel
Attorney for plaintiffs
Nassau County Law Services
Committee, Inc.
1570 Old Country Road
Westbury, New York 11590
Tel. (516) 997-9680

IN UNITED STATES DISTRICT COURT

ORDER TO SHOW CAUSE—RE: Preliminary and Permanent Injunctions and Convening of a Statutory Three-Judge Court

Upon the affidavits of Daisy Johnson, Dorothy Miller, Forestine Pressy and Carl Jay Nathanson dated September 14, 1970, LET defendants show cause in Courtroom No. 9, of the United States Courthouse, 225 Cadman Plaza, Brooklyn, New York, on the 25 day of September, 1970, at 10 a.m. or as soon thereafter as Counsel can be heard why an order should not issue granting plaintiffs herein the following relief:

1. A preliminary and permanent injunction restraining and enjoining defendants, their successors in office, agents and employees and all persons in active concert and participation with them, from enforcing and implementing the provisions of New York Education Law § 701 insofar as said provisions deny free textbooks to pupils in grades one to six.

2. A declaratory judgment that New York Education Law § 701, insofar as it requires the distribution of free textbooks to these pupils in grades seven to twelve while denying free textbooks to those pupils in grades one to six creates an arbitrary, irrational and unreasonable classification thereby denying equal protection of laws to pupils in grades one to six in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

3. The convening of a statutory three judge District Court for the purpose of hearing and determining this application for the preliminary and permanent injunction in accordance with the provisions of Title 28 United States Code §§ 2281 and 2284.

4. An order determining that this action may properly proceed as a class action pursuant to Rule 23 of the Federal Rule of Civil Procedure.

Let the defendants further show cause why a temporary restraining order pursuant to Title 28 of the United States Code § 2284 should not issue restraining the de-

fendants from enforcing and implementing the provisions of New York Education Law § 701 insofar as it requires the distribution of free textbooks to those pupils in grades seven to twelve while denying free textbooks to pupils in grades one to six, pending the hearing and determination of plaintiffs motion for a preliminary and permanent injunction on the grounds that:

1. Enforcement of the provisions of New York Education Law § 701 results in a denial of equal protection of the law as guaranteed by the Fourteenth Amendment to the United States Constitution.
2. Plaintiffs children in grades one to six are suffering immediate and irreparable harm by being deprived of textbooks required for daily instruction and which are both critical and essential to proper educational development.
3. The issuance of a temporary restraining order and preliminary injunction will prevent irreparable injury to plaintiffs and will not cause undue inconvenience or loss to defendants.
4. Plaintiffs have no adequate remedy at law.

IT IS ORDERED that service of this Order and its accompanying papers on defendant NEW YORK STATE EDUCATION DEPARTMENT and EWALD B. NYQUIST, as Commissioner of the New York State Department of Education; the defendant UNION FREE SCHOOL DISTRICT No. 27, Town of Hempstead, by service on the school district clerk, and on defendant EDWARD MOYER, as Superintendent of the Union Free School District No. 27, Town of Hempstead, New York, on or before the 18 day of September, 1970 be deemed sufficient.

It is further ordered that service of this Order may be made by any of the attorneys for the plaintiff.

At the United States Courthouse,
225 Cadman Plaza, Brooklyn, New York,
this 16 day of September, 1970.

/s/ ANTHONY J. TRAVIA
United States District Judge

IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF CARL JAY NATHANSON IN SUPPORT OF ORDER TO SHOW CAUSE

CARL JAY NATHANSON, being duly sworn, deposes and says:

1) I am an attorney with the Nassau County Law Services Committee, Inc., attorney for the plaintiffs herein and I make this affidavit in support of the instant order to show cause containing 1) an application for a preliminary and permanent injunction restraining defendants from enforcing the provisions of New York Education Law, § 701, insofar as said provisions denies free text-books to pupils in grades one to six, and 2) an application for the convening of a statutory three judge District Court.

2) New York Education Law § 701, subdivision 3, enacted in 1965, requires that text-books be loaned free to children enrolled in grades 7 through 12 of public schools or of private schools which satisfy the compulsory attendance requirements.

3) Section 701, subdivision 3, provides as follows:

> "3. In the several cities and school districts of the state, boards of education, trustees or such body or officers as perform the function of such boards shall have the power and duty to purchase and to loan upon individual request, to all children residing in such district who are enrolled in grades seven to twelve of a public or private school which complies with the compulsory education law, text-books. Text-books loaned to children enrolled in grades seven to twelve of said private schools shall be text-books which are designated for use in any public, elementary or secondary schools of the state or are approved by any boards of education, trustees or other school authorities. Such text-books are to be loaned free to such children subject to such rules and regulations as are or may be prescribed by the board of regents and such boards of education, trustees or other school authorities."

4) There is no corresponding provision under the Education Law requiring that text-books be loaned free to children enrolled in grades one to six in public or private schools which satisfy the compulsory attendance requirements. Education Law, § 703 authorizes qualified voters of any school district to vote a tax for the purchase of text-books and if a tax be voted the school district shall purchase and loan text-books free to all the pupils in grades one to six in the school district. Section 703 provides:

> "1. The qualified voters of any school district present at any annual school meeting or at any special school meeting duly and legally called for that purpose, shall have power, by a majority vote, to be ascertained by taking and recording the ayes and noes, to vote a tax for the purchase of all text-books used, or to be used, by pupils enrolled in grades one to six, inclusive, in the schools of the district.
>
> 2. If such tax shall be voted, it shall be the duty of the board of education or trustees of such district, within ninety days thereafter, to purchase and furnish free, text-books to all the pupils in grades one through six inclusive attending the schools in such district. Such board of education or trustees shall have power to establish such rules and regulations concerning the use by the pupils of such text-books, and the care, preservation and custody thereof as it shall deem necessary."

5) In June, 1970, the qualified voters of Union Free School District No. 27, Town of Hempstead, New York, commonly referred to as the West Hempstead Public Schools, rejected the proposed 1970-1971 school budget.

6) The qualified voters of the school district also voted against a tax for the purchase and loan of text-books free to the pupils in grades one to six of the school district.

7) In August, 1970, the defendant school board notified the plaintiffs and other parents of school children in the district that pupils in grades seven to twelve would be loaned text-books free of charge, while pupils

in grades kindergarten to six would be required to rent text-books at a cost of $7.50.

8) Plaintiffs DAISY JOHNSON, DOROTHY MILLER and FORESTINE PRESSY, are parents of pupils in grades one to third, attending public schools in the defendant Board of Education's school district. The plaintiffs are recipients of public assistance from Nassau County and have been receiving public assistance for more than two years in the Aid to Families with Dependent Children program (AFDC) of the Social Security Act. In March 1969, the New York Legislature (Laws of 1969, Ch. 184 as amended by Ch. 411, amending § 131—a New York Social Services Law) radically altered the approach to public assistance payments by eliminating all payments for special needs designated as "special needs grants" and adopting a system fixing maximum allowances per family. The plaintiffs are without funds to enable them to purchase the text-books for their children's required daily instruction. Plaintiffs' children are without text-books and have been denied free text-books by defendant school board and are unable to rent text-books.

9) On Thursday, September 10, 1970, deponent telephoned Mr. Edward Moyer, Superintendent of Public Schools of West Hempstead and informed him that the parents of children in the school district receiving public assistance were unable to pay the fees demanded by the school board for rental of required text-books and were thus being deprived of text-books by the imposition of the rental fees. Mr. Moyer expressed compassion for the plaintiffs' plight and informed deponent that only the pupils in grades one to six were required by the Education Law, and in the absence of the voter's approval of a tax for the purchase and free loan of text-book the board was required to extract a rental charge. Pupils in grades seven to twelve, he stated, by law, must receive free text-books. No special provision could be made for children who were without funds to pay the rental charges.

10) Plaintiffs' children and all other children in grades one to six have been denied free text-books critical to

their right in New York State to receive an adequate education by reason of the provisions of Education Law, Section 701. The classification of pupils who are to receive free text-books in New York State and those who must pay for them, is arbitrary, irrational and without any constitutionally permissable purpose. The provisions of Education Law § 701, deny plaintiffs, and all other persons similarly situated, equal protection of the laws as guaranteed by the Fourteenth Amendment of the United States Constitution. The invidious classification denies pupils in grades one to six their fundamental rights to be educated by permitting their right to receive free text-books to be subject to the will of the voters of the district while mandating free text-books for pupils in grades seven to twelve. As such, the statutory scheme effects severe discriminations whereby poor children in their formative years, so critical to early development and later opportunity in life, are denied text-books—the very pillars of classroom learning. Such textbooks are available free of charge to older children and are provided even now to younger children with parents of means sufficient to pay defendants' fee. This discrimination is imposed in three respects as set forth in the claims contained in plaintiffs' complaint. No rational basis exists for providing free text-books to children in grades seven through twelve while denying them to children in grades one through six, (First Cause of Action), nor for subjecting the younger children's right to receive text-books free of charge to a local school district tax assessment vote while issuing text-books automatically to all other children in higher grades. (Second Cause of Action). Mere longevity or greater sophistication in reading are wholly arbitrary and invidio criteria used to deprive those most in need of reading aids. Likewise making a child's ability to obtain a decent education dependent and contingent upon his parent's pocketbook, and it surely can be said that text-book-less learning is *indecent* education, bears no relation to the purpose of the law challenged, that of providing a free public education to all children.

The Supreme Court in *Shapiro* v. *Thompson*, 394 U.S. 618 (1969) held that welfare residency requirements were an invidious classification which violated the equal protection of the law provision of the Fourteenth Amendment to the United States Constitution. The Court rejected the contention that the classification was permissable because it was compelled by the state's desire to preserve fiscal integrity. The instant classification is similarly without compelling state interest.

11) No previous application for the relief requested has been made to this or any other Court.

WHEREFORE plaintiffs ask that the following relief be granted:

1. A preliminary and permanent injunction restraining and enjoining defendants, their successors in office, agents and employees and all persons in active concert and participation with them, from enforcing and implementing the provisions of New York Education Law § 701 insofar as said provisions deny free text-books to pupils in grades one to six.

2. The convening of a statutory three judge District Court for the purpose of hearing and determining this application for the preliminary and permanent injunction in accordance with the provisions of Title 28 United States Code §§ 2281 and 2284.

3. An order determining that this action may properly proceed as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure.

(Sworn to by CARL JAY NATHANSON,
September 14, 1970)

IN UNITED STATES DISTRICT COURT

Affidavit of Daisy Johnson

DAISY JOHNSON, being duly sworn deposes and says:

1. I am over twenty one years of age, am a citizen of the United States and reside in Nassau County, Town of Hempstead, State of New York together with my four infant children.

2. For the past two years we have received public assistance from the Nassau County Department of Social Services in the Aid to Families with Dependent Children program.

3. We reside within Union Free School District No. 27, Town of Hempstead, New York commonly known as the West Hempstead public school district.

4. All my children attend the public schools of the West Hempstead school district. My son Herron age 8 attends third grade at the Chestnut School; my son Reberick age 6 attends the second grade; my son Roderick age 5 attends the first grade and my daughter Zena attends Kindergarten classes at the Marion M. Delaney School.

5. On or about August 31, 1970, I received a letter from the defendant school board informing me that all children in grades kindergarten to six would be required to pay a rental charge for the loan of textbooks. Last year my children and all other children were loaned textbooks without charge. (A copy of the letter is annexed hereto as Exhibit A). In addition the school board no longer provides bus transportation for the children and I must walk with the four children more than a mile twice a day or pay more than $40 a month for public transportation. I receive no allowance for this expense.

6. On the first day of school, September 9, 1970 my childrens' teachers distributed textbooks to all pupils who paid the rental charge. I am unable to pay the rental charge and my children have been denied textbooks required for their daily instruction.

7. I have been informed by my attorney that at my request he telephoned the Superintendent of schools to inform him of my inability to pay for the rental of books and that he was told the board was complying with Section 701 and 703 of the Education Law, which in the absence of voter approval required them to loan books free to pupils in grades seven to twelve and rent books to pupils in grades one to six.

8. The textbooks are necessary for my children to obtain a decent education and they will be irreparably harmed if they are forced because of my poverty to continue without school books.

9. My caseworker has informed that she cannot help me because she cannot issue a special grant for either transportation or books under the New York Social Services Law.

10. I respectfully ask this Court to grant the relief as requested.

/s/ DAISY JOHNSON
DAISY JOHNSON

(Sworn to by DAISY JOHNSON, September 14, 1970.)

IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF DOROTHY MILLER

DOROTHY MILLER, being duly sworn deposes and says:

1. I am over twenty one years of age, am a citizen of the United States and reside in Nassau County, Town of Hempstead, State of New York together with my three infant children.

2. For the past two years we have received public assistance from the Nassau County Department of Social Service in the Aid to Families with Dependent Children program.

3. We reside within Union Free School District No. 27, Town of Hempstead, New York commonly known as the West Hempstead public school district.

4. My daughter Sheshonia age 5 attends first grade at the Marion M. Delaney School.

5. On or about August 31, 1970, I received a letter from the defendant school board informing me that all children in grades kindergarten to six would be required to pay a rental charge for the loan of textbooks. Last year my child and all other children were loaned textbooks without charge. (A copy of the letter is annexed hereto as Exhibit A.) In addition the school board no longer provides bus transportation for the children and I must walk with my daughter more than a mile twice a day or pay $12 monthly for public transportation. I receive no allowance for this expense.

6. On the first day of school, September 9, 1970 my child's teacher distributed textbooks to all pupils who paid the rental charge. I am unable to pay the rental charge and my child has been denied textbooks required for her daily instruction.

7. I have been informed by my attorney that at my request he telephoned the Superintendent of schools to inform him of my inability to pay for the rental of books and that he was told the board was complying with Section 701 and 703 of the Education Law, which in the absence of voter approval required them to loan

books free to pupils in grades seven to twelve and rent books to pupils in grades one to six.

8. The textbooks are necessary for my child to obtain a decent education and she will be irreparably harmed if she is forced because of my poverty to continue without school books.

9. My caseworker has informed me that she cannot help me because she cannot issue a special grant for either transportation or books under the New York Social Services Law.

10. I respectfully ask this Court to grant the relief as requested.

/s/ DOROTHY MILLER
DOROTHY MILLER

(Sworn to by Dorothy Miller, September 14, 1970)

IN UNITED STATES DISTRICT COURT

Affidavit of Forestine Pressy

FORESTINE PRESSY, being duly sworn deposes and says:

1. I am over twenty one years of age, am a citizen of the United States and reside in Nassau County, Town of Hempstead, State of New York together with my four infant children.

2. For the past two years we have received public assistance from the Nassau County Department of Social Services in the Aid to Families with Dependent Children program.

3. We reside within Union Free School District No. 27, Town of Hempstead, New York commonly known as the West Hempstead public school district.

4. My daughter Paulette age 6½ attends second grade at the Marion M. Delaney School.

5. On or about August 31, 1970, I received a letter from the defendant school board informing me that all children in grades kindergarten to six would be required to pay a rental charge for the loan of textbooks. Last year my child and all other children were loaned textbooks without charge. (A copy of the letter is annexed hereto as Exhibit A.) In addition the school board no longer provides bus transportation for the children and I must walk with my daughter more than a mile twice a day or pay $12 monthly for public transportation. I receive no allowance for this expense.

6. On the first day of school my daughter asked her teacher for textbooks and was told that she would have to bring money from her mother to obtain textbooks. My daughter asked me upon her return from school why some children in her class were given books, and I told her, that the parents of those children were able to pay for the textbooks. I told my daughter that I would try to get the books for her. I have asked my caseworker for help, but she said there was nothing she could do. In addition, the school board no longer provides free bus transportation, and I must pay for public transporta-

tion to carry my child to the school which is more than twenty blocks away from our home.

7. I have been informed by my attorney that at my request he telephoned the Superintendent of schools to inform him of my inability to pay for the rental of books and that he was told the board was complying with Section 701 and 703 of the Education Law, which in the absence of voter approval required them to loan books free to pupils in grades seven to twelve and rent books to pupils in grades one to six.

8. The textbooks are necessary for my child to obtain a decent education and she will be irreparably harmed if she is forced because of my poverty to continue without school books.

9. My caseworker has informed me that she cannot help me because she cannot issue a special grant for either transportation or books under the New York Social Services Law.

10. I respectfully ask this Court to grant the relief as requested.

/s/ FORESTINE PRESSY
FORESTINE PRESSY

(Sworn to by FORESTINE PRESSY
September 14, 1970)

IN UNITED STATES DISTRICT COURT

Affidavit of Carl Jay Nathanson

CARL JAY NATHANSON, being duly sworn, deposes and says:

I am an attorney with the Nassau County Law Services Committee, Inc., attorney for the plaintiffs, and make this affidavit in support of an application for a temporary restraining order pending the hearing of the application for the convening of a statutory three judge court.

More than two weeks have elapsed since the start of the 1970-71 school term and plaintiffs' children in attendance in grades one to six remain text-book less and unable to pay the rental fee.

The denial of text-books to plaintiffs' children who sit in classrooms with children who have textbooks, has and continues to harm the plaintiffs' children by generating a feeling of inferiority as to their status in the class that may effect their hearts and minds in a way unlikely ever to be done. Being denied text-books so critical to education (see affidavit of Dr. Gerald G. Glass) while other classmates have text-books retards the educational and mental developemnt of plaintiffs' children.

Each day the plaintiffs' children and all other children in grades one to six without text-books are subjected to harsh and intolerable pressures by the teachers which include the following: (a) Herron Johnson, age 8, attends the third grade. Each day he is told that he will receive an "F" for the day because he is without the required text-books. When the other pupils in the class read from text-books, the teacher doesn't let him share a book with another pupil, instead she gives him paper and tells him to draw. (b) Reberick Johnson, age 6, attends the second grade; when his teacher, Mrs. Levinson, gives out reading books to the children who have paid the rental charge, Reberick says, "I don't get it like everyone else." Each day he is told he is the only one in the class without books. (c) Paulette Pressy,

age 6½, attends the second grade; she has been repeatedly told by Mrs. Zimmer, her teacher, "No money, no books". Paulette says when the other children read from their books, the teacher, "gives me paper to draw on".

This Court is authorized to issue in its discretion a Temporary Restraining Order pending the convening of the three judge court where irreparable harm would otherwise result to plaintiffs. 28 U.S.C. 2284(3). *Traffic Telephone Workers Federation of New Jersey*, 71 F. Supp. 681 (D. N. J. 1947). The issues raised by plaintiffs need merely be "justifiable" and the threat of irreparable injury real in order for a temporary order to issue. Even pending the determination of plaintiffs' instant motion for convening of a statutory three judge court, a temporary restraining order is warranted where the plaintiffs have raised "serious, substantial and difficult" issues, and shown a "reasonable possibility of success". *G.B.C. Inc.* v. *United States*, 302 F. Supp. 1283 (E.D. Term 1969). Where a probability of success is shown, and the harm to plaintiffs without the injunction is greater than the harm caused to the defendants by the issuance of the injunction, the Court may and should provide temporary relief. See *Clairol Incorporated* v. *Gillette Company*, 389 F. 2d 264 (2d Cir. 1968); *Unicorn Manufacturing Corp.* v. *Koppers Company*, 366 F. 2d 199, 204 (2d Cir. 1966); *Dino de Laurentiis Cinematographica, S.p.A.* v. *D-150, Inc.*, 366 F. 2d 373, 375 (2d Cir. 1966); *Hamilton Watch Co.* v. *Benrus Watch Co.*, 206 F. 2d 738 (2d Cir. 1953); *Rothstein* v. *Wyman*, 303 F. Supp. 339 (SDNY 1969), vacated on other grounds, 38 USLW 3477 (June 2, 1970).

Each day that plaintiffs' children are denied textbooks, is a day in which their educational development has been retarded and their mental development impaired. To compel plaintiffs' children to attend classes and sit text-bookless in classrooms with children who have text-books is to stigmatize plaintiffs' children in the eyes of their classmates and teachers, and to implant unjustly in them a sense of inferiority with other children and to seed his mind with hopeless frustration.

The despair and destruction caused to each child's self image and aspirations can never be set right. It can, however, be halted immediately.

The harm to defendants caused by the issuance of a Temporary Restraining Order is slight indeed in light of the apparent fact that the needed books are already on hand in the schools' stockrooms: neither the Superintendent of Schools of defendant school district nor any teacher therein denies that the required text-books are available for pupils, grades one to six. The result of the order sought—enjoining defendants refusal to loan text-books to the children of the named plaintiffs—involves no outlay of funds but merely a slight burden in distributing books. Even if text-books had to be purchased, the slight expense resulting from purchasing and loaning them to plaintiffs' children is far outweighed by the harm inflicted upon these children without such books. Moreover, if the plaintiffs do not ultimately prevail in their motion for a preliminary injunction, defendants would be able to recall the text-books issued as a result of this Court's order.

No prior application has been made for the relief requested herein.

WHEREFORE, plaintiffs respectfully request that this Court issue forthwith a Temporary Restraining Order pursuant to Rule 65 of the Civil Practice Law and Rules, and 28 U.S.C. § 2284(3), pending the determination of plaintiffs' motions for the convening of a three judge court and a preliminary injunction, *restraining the defendants*, their agents and employees *from denying free text-books to the children of the named plaintiffs herein*, and for such other and further relief as to the Court may seem just and proper.

/s/ CARL JAY NATHANSON
CARL JAY NATHANSON

(Sworn to by CARL JAY NATHANSON, September 24, 1970)

IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF DR. GERALD G. GLASS

GERALD G. GLASS, being duly sworn, deposes and says:

I am a professor of Education and Director of the Reading and Study Center and Graduate Program in Reading at Adelphi University, Garden City, New York. I have taught in both elementary and secondary schools and have served as Reading Teacher and Reading Consultant. I have served as Reading Consultant to several school districts in the Long Island area. I received my doctorate from Syracuse University in 1957. I have done demonstration research in early reading activities within the Headstart Program. I am presently conducting research with selective schools in New York City, demonstrating a method of teaching decoding utilizing a perceptual conditioning rationale. I am credited with having developed the theorty of Perceptual Conditioning as the major determinant in learning to decode. I am a Visiting Professor at the University of Oregon. I am a past president of local councils of both the International Reading Association and the Council for Exceptional Children. I am a member of the Professional Advisory Board of the Association for Children with Learning Disabilities, and the Nassau County Board of Cooperative Educational Services. I am co-author of *From Flays into Reading* (Allyn & Bacon) with Muriel Klein, and a contributor to a volume in the "Learning Disorders" series, Vol. IV, *Reading Disability* (1970).

I have been included in the forthcoming volume, *Right to Read*, as one of twenty persons in the Nation making major contributions to the field of Reading.

At the request of Carl Jay Nathanson of Nassau County Law Services Committee, Inc., attorney for the plaintiffs, I have evaluated the effect of a deprivation of text-books upon pupils in grades one to six.

No educational program can exist without books. It is professionally unthinkable to assume that an educational program of even the meagerest scope would not minimally

include books. Books of all kinds, readers, workbooks, trade books, reference books, et al. The process of education, as conceived in this country, assumes that persons must "learn" not only from their own relatively narrow, actual experiences, but also from that extensive dimension that can only be offered through books.

Only books can speak to the child, at his request. Books can put the child into worlds beyond his own as one important step onto helping him establish the crucial "higher horizons". Without books lessons in school become just that—only lessons—and not an avenue toward utilizing the printed word in order to become well educated. A child without books is like a kitchen with only utensils and neither cooking facilities nor food. Both the process and product are gone.

It goes without saying that a good and successful education is crucial in the life of a child. Our country is racked in dissent and potential turmoil primarily because of the problem inherent in our schools today. The major academic problem is teaching youngsters to read—particularly those unfortunate children who come from very low social-economic backgrounds. It would be both cruel and professionally stupid to assume that the absence of books from the classroom would not significantly make the survival problem of learning to read unsolvable. It is most bizarre irony, in light of our expressed commitment to education, to observe poor children in West Hempstead being deprived of books.

A curriculum cannot survive without books. A classroom without books for all is a sham. It is both inadequate educationally and a waste of taxpayer's money. Best to close the schools and send the children back to the factories—at least there the productivity would be apparent.

I have been actively involved in the profession of education since 1950. My degrees include a Bachelors, Masters and a Ph. D. I have taught grade school and have been teaching at the university level for twelve years. All my experience and training have involved me in almost every phase of the educational scene. Try as I may I cannot recall any research findings or expressed opin-

ions of educators that would justify the assumption that text-books are necessary for secondary school students but not for grade school students. In fact, in my opinion a good case could be made for the grade school as having more pertinent requirements for text-books. Because the early school years are the formative school years, a wealth of material needs to be applied to offer the youngsters reinforcement for learning. It is not uncommon that a text-book in the primary grades serves as the major structure for the whole curriculum in any one subject. The youngsters are not as yet able to leave their text-books and work in various resource and reference facilities found in libraries. They are still "learning to read" and are not yet able in the area of "reading to learn". Thus, an elementary school youngster deprived of his text-books may in essence be deprived of the curriculum for that subject. In contrast, a high school student without a text-book could, with just a minimum amount of library work, discover the content of his own text-book in other sources. It is also a fact that if the elementary school does not utilize its text-books effectively the students would not have the basic skills to leave their text-books and work in the various library sources, as required in the secondary school. Thus, it would be impossible to have a successful high school program if the elementary school did not have good text-books from which to study.

/s/ GERALD G. GLASS
GERALD G. GLASS

(Sworn to by DR. GERALD G. GLASS on September 24, 1970.)

IN UNITED STATES DISTRICT COURT

ANSWER

The defendants, BOARD OF EDUCATION, Union Free School District No. 27, Town of Hempstead, Nassau County, New York, and EDWARD MOYER, as Superintendent of Schools, for their answer to the complaint herein, allege:

Answering Section I

1. Deny the allegations stated in Section I and beg leave to refer to the entire complaint.

Answering Section II

2. Deny the allegations stated in Section II and refer to the complete provisions of Education Law, Sections 701 and 703.

3. Admit the notification to parents as set forth in letter dated August 31, 1970, and the schedule of fees as annexed to the complaint; and further admit that the proposed school district budget was not approved.

Answering Sections III and IV

4. Deny the allegations stated in Section III and Section IV.

Answering Section V

5. Deny the allegations stated in paragraphs 1, 2, 3, 4 and 10, and beg leave to refer to the complete provisions of the section of the New York State Constitution and the paragraphs of the Education Law cited.

6. Admit the allegations stated in Paragraphs 5, 6, 7, 8 and 9.

Answering Section VII

7. Deny the allegations stated in paragraphs 1, 2, except admit plaintiffs' children attend the West Hempstead Public Schools in the grades indicated and were requested to pay the fees set forth in the schedule annexed to the complaint.

Answering Section VIII

8. Deny the allegations stated in paragraphs 1, 2, 3, and 4 as incomplete and beg leave to refer to the complete provisions of the paragraphs of the Education Law cited.

Answering Section IX

9. Deny the allegations stated in Section IX.

Answering Section X

10. Deny the allegations stated in Section X, except admit that under the provisions of the New York State Education Law, textbooks may not be provided free of charge to pupils in grades 1-6, when the voters have failed to approve a school district budget.

Answering Sections XI and XII

11. Deny the allegations stated in Sections XI and XII and beg leave to refer to the complete provisions of the Education Law heretofore alleged in the complaint.

12. Admit that the denial of free textbooks places some children under an educational disadvantage and denies to them an educational opportunity equal to the children of those families that can afford to pay a rental charge for textbooks.

First Defense

13. The complaint fails to state a claim against the defendants upon which relief can be granted.

Second Defense

14. In accordance with New York State Education Law, no board of education may incur a district liability in excess of the amount appropriated by a vote of the qualified voters unless such board is specifically authorized by law to incur such liability. In the absence of voter approval, the defendant Board of Education has no power to furnish free, textbooks to pupils in grades one through six.

Third Defense

15. The defendant Board of Education is presently operating under an "austerity" budget. Textbooks to pupils in grades one through six, together with many important school programs are not now considered ordinary contingent expenses and should be corrected by action of the New York State Legislature.

WHEREFORE, defendants demand that the complaint be dismissed.

/s/ HENRY A. WEINSTEIN
HENRY A. WEINSTEIN
Attorney for Defendants
Board of Education, Union Free
School District No. 27, and

EDWARD MOYER
158 Third Street
Mineola, New York 11501
516 747 2734

IN UNITED STATES DISTRICT COURT

Affidavit of Donald Siskind

DONALD J. SISKIND, being duly sworn, deposes and says:

1. I am President of the defendant Board of Education, Union Free School District No. 27, Town of Hempstead, Nassau County, New York, a corporate body which operates and conducts a public school system commonly known as the West Hempstead Public Schools.

2. I make this Affidavit in opposition (as hereinafter set forth) to the Motion which seeks a preliminary and permanent injunction restraining the defendant Board of Education from enforcing and implementing the provisions of New York State Education Law, Section 701 insofar as said provisions deny free textbooks to pupils in grades one to six; for a declaratory judgment holding said section unconstitutional insofar as it requires the distribution of free textbooks to pupils in grades seven to twelve, but not to pupils in grades one to six; for an Order convening a statutory three Judge District Court to hear and determine this application and for an Order determining that this action may properly proceed as a class action.

3. Heretofore, in June, 1970, and thereafter in July, 1970, at both the annual and a special district meeting called for such purpose, the defendant Board of Education, in accordance with Section 1716 of the Education Law, presented for voter approval a detailed statement in writing of the amount of money which would be required for the ensuing year for school purposes exclusive of public moneys. On each of the aforesaid occasions, the voters rejected the budget submitted. A third such vote is scheduled for Tuesday, September 29, 1970. Approval of the budget at this time may well render this action academic.

4. Under Section 1718 of the Education Law, no board of education shall incur a district liability in excess of the amount appropriated by a district meeting unless such board is specifically authorized by law to incur such lia-

bility. In the absence of voter approval, the Board of Education proceeded in accordance with Section 2023 of the Education Law, which authorizes a board to levy a tax in the absence of voter approval for the sum estimated necessary for teachers' salaries and for ordinary contingent expenses.

5. When a board of education is faced with adopting a contingent budget after the voters have refused or continued to refuse to approve the budget, the crucial question is the determination of what constitutes ordinary contingent expenses. In general, except for those items over which the statutes themselves either provide mandates for, or give discretion to the board of education, these may be considered those expenditures deemed to be absolutely necessary to operate and maintain schools. Section 701 of the Education Law, in reference to text books for grades 7-12, states that a board of education ". . . shall have the power and duty to purchase and loan . . . textbooks." No such provision exists for grades K-6.

6. Opinion 213 of Counsel to the Education Department, dated July 6, 1967, describes some expenditures which are not considered to be acceptable ordinary contingent expense items. In general these are defined as those items which are not required to maintain a minimum educational program nor to assure the health and safety of students and staff. Excluded are those expenditures which, by law, only the voters can authorize. Examples of the latter are textbooks for grades K-6 and certain transportation. Also not deemed to be ordinary contingent expenses are, among other things, restricted use of school buildings and grounds to outside organizations, capital expenditures, except in an emergency, interscholastic programs and restricted cafeteria and school lunch operations, as well as the purchase of new library books and instructional supplies. Included are teachers' salaraies and among other things, janitors' services, lights, office supplies, water and telephone service, as well as minimum school transportation.

7. Section 2024 of the Education Law provides that if any question shall arise as to what are ordinary contin-

gent expenses, the same may be referred to the Commissioner of Education. His decision shall be conclusive.

8. The defendant Board of Education, as a corporate body engaged in performing a duty imposed upon the Legislature by the State Constitution, is not only obligated but required to obey, follow and adhere to the provisions of the Education Law, and the decisions, orders and regulations of the Commissioner of Education. Failure to do so may result in removal from office and our share of state aid apportionment may be withheld under Section 306 and 1706 of the Education Law.

9. The obligation to obey the law, however, has not prevented the defendant Board of Education from seeking amendments or changes therein. Particularly with respect to textbooks, we have ourselves proposed a resolution for adoption at the New York State School Board Convention to be held next month. In this resolution we urge, among other things, that the State School Board Association actively support legislation which among other things would authorize the levy of a tax by a school district without voter approval in order to provide textbooks for students in grades K-6. We urged that despite the rejection of a proposed budget, the youth of our state should have access to an uninterrupted education and that the denial of textbooks to students in grades K-6 constitutes a serious disruption of such education. A substantially similar resolution has been introduced by another member board of education and has been recommended for approval by the Board of Directors of the State School Board Association. That resolution likewise seeks to extend the provision for free textbooks under contingency budgets to include children in grades K-6, as well as in grades 7 to 12, on the basis that it denies equal educational opportunity to the children of those families that cannot afford to buy textbooks. We are advised that the resolution has already gained legislative support.

10. While the thrust of the moving papers is to declare Section 701 of the Education Law unconstitutional, we would point out that Education Law Section 703, with respect to which no relief is sought, must be taken into consideration, and will be affected by any disposition of

this matter. That section expressly grants to the qualified voters of any school district the power to vote a tax for the purchase of all textbooks for pupils enrolled in grades 1-6.

11. The defendant Board of Education, as an autonomous, independent governmental unit may not and cannot pass upon the constitutionality of Section 701. We believe, however, that textbooks for all pupils are essential to a quality educational program and a necessary and fundamentally basic tool in the education of youngsters. We oppose this motion principally because we believe the remedy lies with the New York State Legislature and not with this Court.

/s/ DONALD J. SISKIND
DONALD J. SISKIND, President
Board of Education, West
Hempstead Public Schools

(Sworn to by DONALD J. SISKIND, September 23, 1970)

IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF EDWARD MOYER

EDWARD MOYER, being duly sworn, deposes and says:

1. I am Superintendent of Schools, West Hempstead Public Schools and one of the named defendants in the above action.

2. As Superintendent of Schools, I am the Chief Executive Officer of the School District with general supervision and direction over all school district activities. It is my duty to enforce all provisions of law and the rules and regulations applicable to the district.

3. The voters of this District have twice rejected a proposed budget and the school district is operating under "austerity" under the provisions of the New York State Education Law. In accordance with the foregoing, textbooks may not be provided free of charge to elementary school students. The denial of free textbooks places some children under an educational disadvantage and denies to them an educational opportunity equal to the children of those families that can afford to pay a rental charge for textbooks. Unfortunately, textbooks for elementary school students and many other essential items and programs are not considered an ordinary contingent expense and therefore are not permissible under an austerity budget. It is hoped that these items will be provided should the voters express their approval on September 29, 1970, when a third budget vote is scheduled.

4. I have read the affidavit of Mr. Donald J. Siskind, the President of our Board of Education submitted simultaneously herewith, and concur and join in the facts and views stated therein.

/s/ EDWARD MOYER
EDWARD MOYER

(Sworn to by EDWARD MOYER on September 23, 1970)

IN UNITED STATES DISTRICT COURT

DECISION AND ORDER, Denying Plaintiffs a Three-Judge Court and dismissing Plaintiffs' Complaint (Travia, J.)

The three plaintiffs are recipients of public assistance and are the parents of six elementary school children who are currently attending schools operated by the Board of Education of Union Free School District No. 27, Town of Hempstead, hereinafter called the "Board". The defendants are the Board, its Superintendent of Schools, Edward Moyer, the New York State Education Department and the Commissioner of Education, Ewald B. Nyquist.

Plaintiffs allege this to be a class action and, therefore, sue individually and on behalf of their minor children and on behalf of all others similarly situated. They challenge the constitutionality of Section 701 of the New York Education Law and claim that said section is violative of the Fourteenth Amendment of the Constitution of the United States in that it has the effect of denying plaintiffs equal protection of the laws.

Section 701 provides, in part:

> "3. In the several cities and *school districts of the state*, boards of education, trustees or such body or officers as perform the function of such boards *shall have the power and duty to purchase and to loan* upon individual request, *to all children* residing in such district *who are enrolled in grades seven to twelve of a public or private school* which complies with the compulsory education law, *text-books*. Text-books loaned to children enrolled in grades seven to twelve of said private schools shall be text-books which are designated for use in any public, elementary or secondary schools of the state or are approved by any boards of education, trustees or other school authorities. Such text-books are to be loaned free to such children subject to such rules and regulations as are or may be prescribed by the board of regents and such boards of education, trustees or other school authorities.

4. *No school district shall,* during the school year nineteen hundred sixty-six - sixty-seven, the school year nineteen hundred sixty-seven - sixty-eight or the school year nineteen hundred sixty-eight - sixty-nine *be required to purchase* or otherwise acquire *text-books,* pursuant to this section, the *cost of which shall exceed an amount equal to fifteen dollars multiplied by the number of children residing in such district who on the first day of October of such school year are enrolled in grades seven through twelve of a public or private school* which complies with the *compulsory education law, or in any subsequent school year be required to purchase or otherwise acquire textbooks, the cost of which shall exceed an amount equal to ten dollars* multiplied by the number of children residing in such district and so enrolled on the first day of October of such subsequent school year; and no school district shall be required to loan textbooks in excess of the textbooks owned or acquired by such district; provided, however that all textbooks owned or acquired by such district shall be loaned to children residing in the district and so enrolled in grades seven through twelve in public and private schools on an equitable basis.

5. In the several cities and school districts of the state, *boards of education,* trustees or other school authorities *may purchase supplies and either rent, sell or loan the same to the pupils attending the public schools* in such cities and school districts upon such terms and under such rules and regulations as may be prescribed by such boards of education, trustees or other school authorities.

6. The *commissioner of education,* in addition to the annual apportionment of public monies pursuant to article seventy-three of this chapter, *shall apportion to each school district an amount equal to the cost of the text-books* purchased and loaned by the district pursuant to this section, *but in no case shall the aid apportioned to the district be in excess of the following amounts*:

a. on account of expenditures made during the school year nineteen hundred sixty-six - sixty-seven, the school year nineteen hundred sixty-seven - sixty-eight or the school year nineteen hundred sixty-eight - sixty-nine an average of *fifteen dollars per pupil* residing in the district and enrolled in grades seven through twelve, and

b. On account of expenditures made in any subsequent school year an average of ten dollars per pupil residing in the district and enrolled in grades seven through twelve." (Emphasis supplied)

Plaintiffs seek the convening of a three judge District Court pursuant to 28 U.S.C. §§ 2281 and 2284, a preliminary and permanent injunction enjoining the defendants from enforcing Section 701 [1] and a declaratory judgment declaring said section unconstitutional.

It is alleged that on or about August 31, 1970 plaintiffs were advised by letter from the Board that all children in grades one to six would be required to pay a $7.50 rental charge on the first day of school for the loan of textbooks; that last year the plaintiffs' children, along with all the other children in those grades, received their text-books without charge; and that on the first day of school this year, textbooks were distributed to all children who paid the rental charge. Plaintiffs also allege that they are recipients of public assistance from the Nassau County Department of Social Services under the Aid to Families with Dependent Children program, and are unable to pay the rental charge,[2] and as a result their children have not received any textbooks.

---

[1] If the operation of § 701 is enjoined, school districts will no longer receive the average of ten dollars ($10) per pupil in grades seven to twelve. Nor will the pupils in those grades be entitled to benefit from the voter approved tax authorized by § 703 (discussed *infra*) since § 703 is limited to pupils in grades one to six.

[2] Recently, New York has adopted a system fixing maximum allowances per family and has eliminated payments for special needs designated as "special needs grants." *N.Y. Social Services Law.* § 131-a.

The imposition of a rental charge for textbooks in grades one to six for the current school year resulted from the action of the local voters in rejecting budgets submitted by the Board in accordance with Section 1716 of the Education Law. On three occasions, the local voters refused to approve a budget.[3] In rejecting the budgets the voters also rejected a tax for the purchase and loan of textbooks free to the children in grades one to six. Authorization for such tax is provided in Section 703 of New York's Education Law.

Section 703 provides:

> "1. *The qualified voters* of any school district present at any annual school meeting or at any special school meeting duly and legally called for that purpose, *shall have the power*, by a majority vote, to be ascertained by taking and recording the ayes and noes, *to vote a tax for the purchase of all text-books used*, or to be used, *by pupils enrolled in grades one to six*, inclusive, in the schools of the district.
>
> 2. *If such tax shall be voted, it shall be the duty of the board* of education or trustees of such district, within ninety days thereafter, *to purchase and furnish free, text-books to all* the *pupils in grades one through six* inclusive attending the schools in such district. Such board of education or trustees shall have power to establish such rules and regulations concerning the use by the pupils of such text-books, and the care, preservation and custody thereof as it shall deem necessary." (Emphasis added).

As a result, the Board proceeded in accordance with Section 2023 of the New York Education Law which authorizes the Board to levy a tax in the absence of voter approval for the amount estimated to be necessary for teachers' salaries and for ordinary contingent expenses. The Board claimed that it could not consider textbooks for grades one to six to be acceptable ordinary contingent expenses. It based such decision on Opinion

[3] Only two of these votes were held prior to the opening of school when the decision to impose a rental charge was made.

213 of Counsel to the Education Department, dated July 6, 1967. Hence, no tax was levied to cover the cost of the textbooks for grades one to six.

The plaintiffs' claim, in essence, is that Section 701 violates the equal protection clause of the Fourteenth Amendment since it "has arbitrarily and unreasonably created two classes of pupils, those in grades seven to twelve, who will receive free textbooks, and those in grades one through six, who must pay for textbooks" in the absence of § 703 voter approval of a tax to pay for such textbooks.

It must be borne in mind that Section 701 grants free textbooks to children in grades seven to twelve only to the extent of Ten Dollars ($10) per pupil after the school year 1969-1970. Section 701(6b).

Jurisdiction

At the outset we are faced with the question of this Court's jurisdiction. Although the defendants have not raised the question of jurisdiction, this Court may raise that question on its own motion. *Thompson* v. *New York Cent. R.Co.*, 361 F. 2d 137 (2d Cir. 1966). In fact, it is this Court's duty to determine, sua sponte, whether it has jurisdiction. *Forgione* v. *United States*, 202 F. 2d 249 (3rd Cir. 1953), *cert. denied*, 345 U.S. 966 (1953); *Fullana Corp.* v. *Puerto Rico Planning Bd.* 257 F. 2d 355 (1st Cir. 1958). The signing of a show cause order does not prevent a subsequent determination that there is no jurisdiction. *Laughlin* v. *Cummings*, 105 F. 2d 71 (D.C. Cir. 1939).

In their complaint the plaintiffs base the jurisdiction of this Court on (a) U.S.C. §§ 1331, 1337 and 1343; (b) 28 U.S.C. §§ 2201 and 2202 and (c) 42 U.S.C. §§ 1983 and 1988 and (d) the United States Constitution and the Fourteenth Amendment thereof.

The Fourteenth Amendment and Section 1331

Since the plaintiffs complain of a denial of equal protection, their action is one that "arises under the Constitution . . . of the United States." 28 U.S.C. § 1331

(a). Section 1331(a) also requires that "the matter in controversy exceeds the sum or value of $10,000 . . ." Plaintiffs allege that the amount in controversy exceeds the jurisdictional amount. Obviously, the $7.50 rental charge each plaintiff is required to pay for each child in grades one to six does not approach the jurisdictional minimum.

The fact that the action is brought on behalf of a class does not help plaintiffs on this point either. If this action can be brought as a class action, which question need not now be decided, it is settled that the claims of the members of the class may not be aggregated to meet the jurisdictional amount. *Snyder* v. *Harris*, 394 U.S. 332 (1969); *Rosado* v. *Wyman*, 414 F. 2d 170 (2d Cir. 1969), *rev'd on other grounds*, 90 S.Ct. 1207 (1970). Hence, the plaintiffs cannot cumulate the rental charges of all children in grades one to six who may be members of the class in an effort to reach the jurisdictional minimum.

It can reasonably be asserted that the plaintiffs' children are suffering far greater damages, viz., a substantial loss in their educational opportunity which undoubtedly will have more serious consequences than the amount of the rental charges herein involved. See *Brown* v. *Bd. of Education*, 347 U.S. 483 at p. 493 (1954). However, damages of this type are considered too speculative to create jurisdiction under § 1331. See *Rosado* v. *Wyman*, *supra*, and the cases cited therein.

Consequently, jurisdiction does not lie under § 1331.

Section 1337

Plaintiffs' reliance on 28 U.S.C. § 1337 is also erroneous. Section 1337 provides:

> "The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies."

This action does not arise under any Act of Congress and, therefore, there is no jurisdiction under § 1337.

213 of Counsel to the Education Department, dated July 6, 1967. Hence, no tax was levied to cover the cost of the textbooks for grades one to six.

The plaintiffs' claim, in essence, is that Section 701 violates the equal protection clause of the Fourteenth Amendment since it "has arbitrarily and unreasonably created two classes of pupils, those in grades seven to twelve, who will receive free textbooks, and those in grades one through six, who must pay for textbooks" in the absence of § 703 voter approval of a tax to pay for such textbooks.

It must be borne in mind that Section 701 grants free textbooks to children in grades seven to twelve only to the extent of Ten Dollars ($10) per pupil after the school year 1969-1970. Section 701(6b).

Jurisdiction

At the outset we are faced with the question of this Court's jurisdiction. Although the defendants have not raised the question of jurisdiction, this Court may raise that question on its own motion. *Thompson* v. *New York Cent. R.Co.*, 361 F. 2d 137 (2d Cir. 1966). In fact, it is this Court's duty to determine, sua sponte, whether it has jurisdiction. *Forgione* v. *United States*, 202 F. 2d 249 (3rd Cir. 1953), *cert. denied*, 345 U.S. 966 (1953); *Fullana Corp.* v. *Puerto Rico Planning Bd.* 257 F. 2d 355 (1st Cir. 1958). The signing of a show cause order does not prevent a subsequent determination that there is no jurisdiction. *Laughlin* v. *Cummings*, 105 F. 2d 71 (D.C. Cir. 1939).

In their complaint the plaintiffs base the jurisdiction of this Court on (a) U.S.C. §§ 1331, 1337 and 1343; (b) 28 U.S.C. §§ 2201 and 2202 and (c) 42 U.S.C. §§ 1983 and 1988 and (d) the United States Constitution and the Fourteenth Amendment thereof.

The Fourteenth Amendment and Section 1331

Since the plaintiffs complain of a denial of equal protection, their action is one that "arises under the Constitution . . . of the United States." 28 U.S.C. § 1331

(a). Section 1331(a) also requires that "the matter in controversy exceeds the sum or value of $10,000 . . ." Plaintiffs allege that the amount in controversy exceeds the jurisdictional amount. Obviously, the $7.50 rental charge each plaintiff is required to pay for each child in grades one to six does not approach the jurisdictional minimum.

The fact that the action is brought on behalf of a class does not help plaintiffs on this point either. If this action can be brought as a class action, which question need not now be decided, it is settled that the claims of the members of the class may not be aggregated to meet the jurisdictional amount. *Snyder* v. *Harris*, 394 U.S. 332 (1969); *Rosado* v. *Wyman*, 414 F. 2d 170 (2d Cir. 1969), *rev'd on other grounds*, 90 S.Ct. 1207 (1970). Hence, the plaintiffs cannot cumulate the rental charges of all children in grades one to six who may be members of the class in an effort to reach the jurisdictional minimum.

It can reasonably be asserted that the plaintiffs' children are suffering far greater damages, viz., a substantial loss in their educational opportunity which undoubtedly will have more serious consequences than the amount of the rental charges herein involved. See *Brown* v. *Bd. of Education*, 347 U.S. 483 at p. 493 (1954). However, damages of this type are considered too speculative to create jurisdiction under § 1331. See *Rosado* v. *Wyman*, *supra*, and the cases cited therein.

Consequently, jurisdiction does not lie under § 1331.

Section 1337

Plaintiffs' reliance on 28 U.S.C. § 1337 is also erroneous. Section 1337 provides:

> "The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies."

This action does not arise under any Act of Congress and, therefore, there is no jurisdiction under § 1337.

Sections 2201 and 2202

By reason of the fact that the plaintiffs are seeking to have § 701 of the New York Education Law declared unconstitutional, they have cited 28 U.S.C. §§ 2201 and 2202 to provide a jurisdictional basis. Section 2201 provides:

> "In a case of actual controversy *within its jurisdiction* . . . , any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such." (Emphasis added).

As the statutory wording clearly indicates, § 2201 does not confer jurisdiction, but merely makes a remedy or procedure available in the federal court where jurisdiction already exists. *Benson* v. *State Bd. of Parole and Probation*, 384 F. 2d 238 (9th Cir. 1967), cert. denied, 391 U.S. 954 (1968); *El Paso Building & Construction Trades Council* v. *El Paso Chapter Associated General Contractors of America*, 376 F. 2d 797 (5th Cir. 1967). The same jurisdictional requirements for a case or controversy under this section must be met as in other suits. *Brown & Root, Inc.* v. *Big Rock Corp.*, 383 F. 2d 662 (5th Cir. 1967).

Nor does § 2202[4] confer jurisdiction. Section 2202 merely provides for the granting of further relief based on a declaratory judgment.

---

[4] "Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment." (§ 2202).

Section 1988

Section 1988[5] is not relevant to the question of jurisdiction. *Dyer* v. *Kazuhisa Abe*, 138 F. Supp. 220 (D. Hawaii 1956), *rev'd on other grounds*, 256 F. 2d 728 (9th Cir. 1958); *Schatte* v. *Int. Alliance of Theatrical Stage Employees and Moving Picture Operators of United States and Canada*, 70 F. Supp. 1008 (S.D. Calif. 1947), *aff'd.* 165 F. 2d 216 (9th Cir.), *cert. denied*, 334 U.S. 812 (1948).

Sections 1983 and 1343

Section 1983 provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

If an action falls within § 1983, jurisdiction lies under § 1343, which provides:

> "The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> * * * *

[5] "The Jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty."

> (3) To redress the deprivation, under color of any state law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;"

The question is whether § 1983 is sufficiently broad to cover this action. On its face, § 1983 is practically all encompassing. The plaintiffs need only show "the deprivation of any rights, privileges or immunities secured by the Constitution and laws. . . ." In protecting "rights . . . secured by the Constitution and laws," § 1983 is capable of being construed as providing unlimited protection not only for "civil rights" but for practically any Federal Constitutional or statutory right without regard to the "amount in controversy" requirement of § 1331. Nevertheless, § 1983 has not been so broadly construed as the wording of the statute would indicate.

Section 1983 comes from § 1979 of the Revised Statutes, which in turn came from § 1 of the Ku Klux Act of April 20, 1871. 17 Stat. 13. Adopted shortly after the end of the Civil War, the statute was enacted to enforce the provisions of the Fourteenth Amendment. This history and purpose of § 1983 have been emphasized by the Supreme Court. *Monroe* v. *Pape*, 365 U.S. 167, 171 (1961); *Hague* v. *CIO*, 307 U.S. 496, 509-510 (1939). Its history shows that the staute "was originally enacted by the Congress in the turbulent days of Reconstruction." *Francis* v. *Lyman*, 216 F. 2d 583, 586 (1st Cir. 1943). The effect of that turbulence on the statute has been noted by the Supreme Court:

> "The dominant conditions of the Reconstruction Period were not conducive to the enactment of carefully considered and coherent legislation. Strong post-war feeling caused inadequate deliberation and led to loose and careless phrasing of laws relating to the new political issues." *United States* v. *Williams*, 341 U.S. 70, 74 (1951).

Despite its speedy adoption the statute fell into a lengthy period of disuse. Not until recent years has § 1983 become the popular weapon of plaintiffs seeking entry into the feder courts. That popularity has created serious problems as Judge Magruder observed in *Francis* v. *Lyman, supra,* at pp. 587-8:

> "When courts come to deal with a statute phrased in terms of such vague generality, they are faced with two possible alternatives:
>
> (1) They may give effect to the statute in its literal wording, and thus reach results so bizarre and startling that the legislative body would probably be shocked into the prompt passage of amendatory legislation. This seems to be the approach which the Third Circuit intended to take in its opinion in *Picking* v. *Pennsylvania R.R.Co.*, 1945, 151 F. 2d 240.
> (2) The courts may refuse to regard the statute as an isolated phenomenon, sticking out like a sore thumb if given a strict, literal application; and upon the contrary may conceive it to be their duty, in apply the statutory language, to fit the statute as harmoniously as may be into the familiar and generally accepted legal background, and to confine its application, within reason, to those situations which might possibly have had the approval of the Congress if it had specifically adverted to the particular cases, bearing in mind the basic purposes which gave rise to the legislation in the first place. We leave it to others to determine whether such judicial process may fairly be characterized as 'interpretation' of the intent of Congress, as disclosed in the statutory language, or whether it is something else. At any rate, it is a function which courts sometimes feel called upon to exercise and indeed which in many cases they are expected to exercise.
>
> From the trend of decisions applying this particular statute, we think it no longer appropriate for this court to proceed in accordance with the first of the above alternatives. . . . Where the act has been invoked in situations which no doubt were a major

> concern of the Reconstruction Congress—for instance, where members of a state board for the registration of voters have refused to permit the registration of a negro, acting under color of discriminatory state legislation—the Supreme Court has not been loath to impose tort liability upon such state officials under the Civil Rights Act. . . . But *beyond such situations, it seems to be the tendency of the decisions to restrict the applications of the Civil Rights Act so as to avoid the appalling inflammation of delicate state-federal relationships which undoubtedly would ensue.*" (Emphasis added).

This Court cannot envision many situations which have the capacity to inflame "delicate state-federal relationships" and state-local relationships more than the present action. Sections 701 and 703, as amended, were born out of a rooted controversy in 1965. Nevertheless, this Court feels it is the better rule to assume jurisdiction of this case under § 1983 and § 1343(3), especially since the "jurisdictional issue" was neither briefed nor argued by the parties, and to consider the claimed deficiencies on the ground that the complaint fails to state a claim upon which relief can be granted. F.R.C.P. 12(b)(6).

Failure to State a Claim

Plaintiffs set forth three causes of action. First, they allege that § 701 creates "an arbitrary, irrational and discriminatory classification which deprives [them] sic and members of their class equal protection of law and an adequate education." Second, plaintiffs claim that § 703, in connection with § 701, subjects their children's right to books "to the arbitrary condition of a local school district tax assessment vote, while no such condition is imposed on older children's right to needed books." Finally, plaintiffs claim that they are denied equal educational opportunity and equal protection of the laws since textbooks are provided to children who are able to pay while such books are denied to children who are unable to pay.

We start with the proposition that under its Constitution, New York State has the primary responsibility for the maintenance of its educational system. In maintaining that system, it may legitimately attempt to conserve its financial resources by imposing some limitations through classifications on its programs, including its educational programs, so long as those classifications do not violate the equal protection clause of the Fourteenth Amendment. Whether or not a classification, here the statutory requirement in § 701 to provide textbooks rent free, up to a certain average cost, to grades seven to twelve, violates the equal protection clause depends upon whether the classification has an invidiously discriminatory purpose and effect. A classification is invidiously discriminatory if it does not have a "reasonable basis" under the traditional equal protection test [see *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U.S. 61 (1911)], or if it is not justified by a "compelling" government interest under the more recent fundamental test [see *Shapiro* v. *Thompson*, 394 U.S. 618 (1970)]. This Court will assume, without deciding, that the latter test is applicable. Nevertheless, this Court concludes that New York's statutory provisions are free of any invidiously discriminatory purpose and effect since it is supported by a compelling government interest.

Prior to the 1965 amendments, the New York Education Law did not make any provision for free textbooks. Instead, § 701 provided that the

> "school authorities may purchase text-books and supplies and *either rent or sell* the same to the pupils attending the public schools. . . ." Former § 701(2). (Emphasis added).[6]

It was left to the voters in the school districts to levy a tax for the purchase of textbooks to be furnished free

[6] The present § 701, providing *free* textbooks for children in grades seven to twelve, is not limited to public schools but includes private schools complying with the compulsory education law. The constitutionality of § 701 on this point was upheld in *Board of Education of Central School District No. 1* v. *Allen*, 392 U.S. 253 (1968).

to children attending the public schools in grades one to twelve. Former § 703.[7]

In deciding whether to extend financial aid for the purchase of textbooks for all children in all schools,[8] the New York Legislature had four choices:

1. To make no contribution to local school districts for the purchase of textbooks to be loaned free of charge to *any* children and allow the then existing laws to stand;
2. To contribute to local school districts for the purchase of textbooks to be loaned free of charge *to all* children in grades one through twelve and repeal the then existing laws with their conditions;
3. To contribute to local school districts for the purchase of textbooks to be loaned free of charge *to all* children in grades one through twelve and pass additional laws restricting the amount to be used for each pupil in grades one through twelve;
4. To contribute to local school districts for the purchase of textbooks to be loaned free of charge to *some* children and amend Section 703 to provide for the others.

Choice of the first alternative was certainly constitutionally permissible and the plaintiffs do not complain of the failure of the Legislature to make this choice; nor do plaintiffs complain of the fact that the Legislature made a choice.

The Legislature may justify its failure to choose the second alternative on the basis of its legitimate interest in conserving the State's fiscal resources, providing that choice does not result in any invidious discrimination. Since choice of the second alternative would concededly

[7] The present § 703, also limited to the public schools, applies only to grades one to six since there is no need for a voter-approved tax for grades seven to twelve in view of the present § 701.

As comparison with the former §§ 701 and 703 reveals, the present sections do not operate to deprive children in grades one to six of anything they possessed prior to the 1965 amendments.

[8] "All schools" is limited to public or private schools which comply with the compulsory education law.

require an expenditure of funds greater than those needed under the third or fourth alternatives and since this Court cannot compel the State to expend any funds, much less additional funds for textbooks, this Court cannot fault the Legislature's failure to choose the second alternative.

It is the Legislature's choice of the fourth rather than the third alternative which has precipitated this action.

Choice Made As a Result of Legislature's Desire That As Many Children As Possible Have Textbooks

In making the fourth choice, the Legislature amended § 703 in 1965 to allow the voters in school districts to vote a tax for the purchase of textbooks for the pupils in grades one to six only. As the State defendants have pointed out, the cost of textbooks in grades seven to twelve is considerably higher than the cost of textbooks in grades one to six. Consequently, the grant in § 701 resulted in giving aid where the need was greatest in the event that the voters of a school district failed to vote a tax for the purchase of textbooks under § 703. Had the Legislature adopted the third alternative and substantially reduced the amount of the per pupil grant (below the $15 and $10 figures), then § 703 would of necessity have to be left unamended—i.e., with the voters of a school district given authority to vote a tax for the purchase of textbooks for children in grades one to twelve for the cost above the state grant. If the voters, under such circumstances, failed to vote for such a tax, then the parents would be required to make up the difference between the amount of the grant and the rental charge for textbooks, a difference which would be considerably more substantial in grades seven to twelve than in grades one to six. The Legislature was entitled to allocate its grant to pupils in those grades where it would do the most good. As the complaint indicates, the rental charge to each pupil in grades one to six is $7.50 per year, which may not be an insignificant amount to the *plaintiffs*, but, when examined from the *Legislature's* point of view,

may have represented the more practical alternative. Under the third alternative if the grant were spread thinly among all pupils and the voters failed to approve the additional cost required by Section 703, the parents would be required to pay the difference. In such an event, the cost to the parents with children in grades seven to twelve would be far greater than the cost to these plaintiffs. Additionally, far more parents would be unable to afford textbooks than is true under the present law and far more children would be without textbooks. New York State has a legitimate, compelling interest in seeing to it that as many as possible of its children receive textbooks.

Plaintiffs claim that their children and the other children in grades one to six have at least as great an educational need as children in the higher grades. However, there is no constitutional requirement that school expenditures be made only on the basis of pupils' educational need. *McInnis* v. *Shapiro*, 293 F. Supp. 327 (N.D. Ill. 1968), *aff'd.* 394 U.S. 322 (1969). When viewed in this light, it is difficult to say the New York Legislature acted without either a compelling interest or a reasonable basis in choosing the fourth alternative. As the Supreme Court recently pointed out:

> "In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some 'reasonable basis', it does not offend the Constitution simply because the classification is not made with mathematical nicety or because 'in practice it results in some inequality.'" 90 S. Ct. 1153, 1161 (1970).

Choice Made As a Result of the Legislature's Decision on Educational Needs

In enacting § 701, the Legislature stated in its declaration of legislative policy:

> "'The security and welfare of the nation require the fullest developemnt of the mental resources and skills of its youth. This calls for made adequate

> educational opportunities and increased efforts to educate more of the talent of our nation and requiring the *correction of those imbalances in our educational programs which have led to an insufficient proportion of our population educated in the fields of science, mathematics, foreign languages and other non-sectarian subjects.* The Congress of the United States has reaffirmed the principle that the states and local communities retain primary responsibility for public education. It is hereby declared to be the public policy of the state that the public welfare and safety require that the state and local communities give assistance to *educational programs which are important to our national defense and the general welfare of the state.*'" (Emphasis added)

It was to aid in "the correction of those imbalances in our educational programs" that the Legislature adopted § 701. Apparently, the Legislature felt that such correction could be accomplished by giving aid to assist local school districts in the purchase of textbooks which were to be used by pupils in the "second half" of their schooling, viz., in grades seven to twelve. It is noteworthy that it is in those grades that the sciences, mathematics and foreign languages are most commonly taught. The Legislature's desire to foster the study of certain subjects is sufficient to sustain the classification.

Additionally, the plaintiffs have come to the wrong forum. Any changes in the allocation of moneys to local school districts should be made by the Legislature. As the Court said in *Snell* v. *Wyman*, 281 F. Supp. 853, 862 (S.D.N.Y. 1968) *aff'd.* 393 U.S. 323 (1969):

> "Plaintiffs' complaints might move us to vote for changes if we sat as state legislators. But they do not approach the showing of irrationality or arbitrariness warranting exercise of the limited veto power of the federal judiciary under the Fourteenth Amendment."

See also, *McInnis* v. *Shapiro*, *supra*, where the Court noted at p. 332:

"Without doubt, the educational potential of each child should be cultivated to the utmost, and the poorer school districts should have more funds with which to improve their schools. But *the allocation of public revenues is a basic policy decision more appropriately handled by a legislature than a court.*" (Emphasis added).

Accordingly, it is

ORDERED that plaintiffs' motion is in all respects denied, and, it is further

ORDERED that the complaint be dismissed.

/s/ ANTHONY J. TRAVIA
U. S. D. J.

IN UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

OPINION AND DISSENTING OPINION OF
COURT OF APPEALS

Before:

MOORE, KAUFMAN and TIMERS,*

Circuit Judges.

Plaintiffs appeal from an order of the United States District Court for the Eastern District of New York, Travia, Judge, dated October 28, 1970, denying plaintiffs' motion to convene a three judge court and dismissing plaintiffs' complaint.

Affirmed.

MOORE, Circuit Judge:

Plaintiffs-appellants are mothers of minor children and bring this action not only individually and on behalf of their children but also on behalf of others similarly situated [a class action]. The children attend school in the Union Free School District No. 27, Town of Hempstead [the School District]. The action is against the New York State Department of Education, Ewald B. Nyquist, as Commissioner of the New York State Education Department and the Board of Education of District No. 27 [the School Board].

Prior to 1965, each school system in New York State had to provide its own financing for the purchase of textbooks. In 1965, New York Education Law §§ 701 and 703 [McKinney's Consol. Laws, 1971] were amended. Quite simply, § 701 provides for state financial assistance [$10 per pupil] for the purchase of textbooks in grades seven through twelve. Section 703 provides that qualified voters within a school district may vote a tax for text-

---

* Chief Judge, District of Connecticut, sitting by designation when oral argument was heard.

books for grades one through six. Under § 701, a School Board must supply textbooks to all children in grades seven through twelve residing in its district, regardless of whether they attend public or private schools. Under § 703, textbooks must be supplied to children in grades one through six wherever the voters authorize a tax for this purpose.

Where the voters fail to approve a proposed real estate tax to finance school operations, the Board may nevertheless levy a real estate tax on the property owners living within the School District, but only for such amounts as are necessary for "ordinary contingent expenses" of such School District. New York State Education Law § 2023 [McKinney's Consol. Laws 1971].[1]

On three occasions, the voters of this School District rejected a budget for the 1970-1971 school year proposed by the defendant School Board, after which the Board assessed a tax in accordance with § 2023.

The Board concluded on the basis of Opinion Number 213 of the Counsel to the Education Department, dated July 6, 1967, that expenditures for textbooks are not considered to be "ordinary contingent expense" items within the meaning of § 2023 of the Education Law. This opinion was based in part on the fact that § 703 authorizes a vote on such expenses. Therefore, the Board decided that it was not legally entitled to tax to raise money for textbooks.[2]

---

[1] Section 2023 provides:

> "If the qualified voters shall neglect or refuse to vote the sum necessary for teachers' salaries, after applying thereto the public school moneys, and other moneys received to be received for that purpose, or if they shall neglect or refuse to vote the sum estimated necessary for ordinary contingent expenses, the sole trustee, board of trustees or board of education may levy a tax for the same, in like manner as if the same had been voted by the qualified voters."

[2] Because no budget was approved, it was necessary for the School Board to charge for various other optional services and supplies. Thus, children living less than a given distance from the school [which varied according to age] were required to walk to school or pay a fee for transportation, and charges were made for certain other supplies including workbooks, duplicating paper,

The complaint sought the following relief:

[1] that a three judge District Court be convened to determine the controversy;

[2] that preliminary and permanent injunctions be entered enjoining defendants from enforcing § 701 of the New York Education Law on the ground that the classification of pupils in grades one to six and grades seven to twelve is "arbitrary, irrational and discriminatory"; and

[3] that a declaratory judgment be entered declaring § 701 et seq. unconstitutional as violating the Fourteenth Amendment.

More specifically, the First Cause of Action claims that § 701 "in(di)vidiously (sic) discriminates . . . by creating an arbitrary and discriminatory classification which deprives plaintiffs and members of their class of equal protection of the law and an adequate education." A Second Cause of Action alleges that §§ 701 and 703 impose a majority vote approval of a tax assessment to enable children in grades one to six to receive free textbooks and that this constitutes a denial of equal protection. A Third Cause of Action states that pursuant to §§ 701 and 703 textbooks can be obtained in grades one to six only upon the payment of a rental fee [$7.50 per pupil]; that plaintiffs are indigent and cannot pay a fee; [3] and that by rea-

---

materials, etc. Children were also required to provide their own pens, pencils, notebooks and the like. Although these facts were mentioned in the complaint, this action only attacks the failure of the defendants to provide textbooks.

[3] Section 131-a of the New York State Social Services Law [McKinney's Consol. Laws, Supp. 1971] provides maximum amounts for benefits to be paid to plaintiffs, and abolishes the old system of special grants for specific items of need, replacing them with fixed grants to be determined based on the needs of families in the area where the recipient lives. Plaintiffs allege that under the old system, grants were made to pay for textbooks. In *Rosado* v. *Wyman*, 397 U.S. 397 (1970), the Supreme Court held this section, as originally enacted, to be in violation of 42 U.S.C. § 602(a)(23) which requires that a state in order to receive federal benefits must not lower the standard of need in use in that state on January 1, 1967. Thereafter, the New York State Legislature passed the new version of § 131-a now in effect, excluding from the maximums such items as housing, fuel for heating, furniture, child care services

son of their poverty their children are deprived of equal educational opportunity. They describe the potential situation quite realistically by alleging [Complaint, XII(b)]:

> "Indigent children sitting bookless, side by side in the same classroom with other more wealthy children learning with purchase [sic] text-books engenders a widespread feeling of inferiority and unfitness in poor children and is psychologically, emotionally and educationally disastrous to their well-being."

An order to show cause for a temporary restraining order was issued by Judge Travia. Affidavits and memoranda were submitted in support of and in opposition to the application. The Board of Education and the Superintendent of Schools answered demanding dismissal of the complaint.

In his decision, Judge Travia assumed jurisdiction under 42 U.S.C. § 1983 and 28 U.S.C. § 1343 [4] and proceeded to consider "the claimed deficiencies on the ground that the complaint fails to state a claim upon which relief can be granted. F.R.C.P. 12(b)(6)." 319 F. Supp. at 278. In essence the court held that in enacting §§ 701 and 703, the Legislature acted on a reasonable basis free from irrationality or arbitrariness; that "the Legislature was entitled to allocate its grant to pupils in those grades where it would do the most good"; and "that New York State has a legitimate compelling interest in seeing to it that as many as possible of its children receive text-books." 319 F. Supp. at 280. The court, therefore, denied plaintiffs' motion and dismissed the complaint. From the denial of

---

and the like. In the face of the new law, New York has continued to receive federal funds, and no allegation is made here that § 131-a is still inconsistent with 42 U.S.C. § 602(a)(23). Thus it would appear that the fixed allowance received by plaintiffs was intended to cover this as well as other contingent needs. This is especially so since the failure to provide books resulted in a similar expense for all children in the School District.

[4] Since we conclude that the District Judge properly dismissed the entire complaint, we need not discuss which defendants were appropriate parties under § 1983 and the Eleventh Amendment. See *McMillan* v. *Board of Education*, 430 F.2d 1145, 1148, 1149 (2nd Cir. 1970).

the motion for the convening of a three judge statutory court, and the dismissal of the complaint, plaintiffs appeal. In addition to the briefs of the parties, this court has the advantage of a well-prepared brief and reply brief submitted by the Center for Law and Education of Harvard University.

At the outset, there must be a determination as to whether Judge Travia properly denied plaintiffs' motion for the convening of a three judge court. If a three judge court is ultimately to decide upon the rationality of the New York State Legislature's enactment of §§ 701 and 703, there is little to be gained by having this court of three judges subject its own rationality to further scrutiny.

The guidelines stated by the Supreme Court in *Idlewild* v. *Bon Voyages Liquor Corp.* v. *Epstein*, 370 U.S. 713, 715 (1962) were that the "district court's inquiry is appropriately limited to determining whether the constitutional question raised is substantial and whether the case presented otherwise comes within the requirements of the three judge statute." But what is "substantial"? And who is to make this decision? Quite obviously, only the court of last resort—and even then the concept of rationality of legislative judgment may be decreed by the narrow margin of a five to four vote. Searching further in a field where precedent is supposedly helpful, we find that the district court may reject a constitutional claim "because its unsoundness so clearly results from the previous decisions of this Court [the Supreme Court] as to foreclose the subject." *California Water Service Co.* v. *City of Redding*, 304 U.S. 252, 255 (1938).

This admonition requires research into decisions of the Supreme Court which might "foreclose the subject." If the decisions justify such a conclusion, the Supreme Court with all its pressing business should not have to cope with indiscriminate three judge appeals. This case is an example. The district judge hears the case and this court hears it. Four judges. Should this court send the case to a three-judge court two more. Then to the Supreme Court. Fifteen judges in all will have reviewed the rationality of a legislative body. If we affirm, four judges

will have been involved and the Supreme Court at least will have the privilege of deciding whether they wish to become further involved.

Recently the three judge court problem was considered by this court in *Miller* v. *New York Stock Exchange*, 425 F. 2d 1074, cert. den. 398 U.S. 905 (1970), wherein the question was whether "we must nevertheless reverse because the result was not so clearly predestined that he could dispense with having two other judges, possibly two of us, help him reach it—and this even though the State, for whose benefit the three-judge provision was enacted, was quite content to have him act alone." We concluded that it was unnecessary to reverse under these circumstances even though it denied the plaintiffs a direct appeal to the Supreme Court. We referred to the guidelines set forth in *Green* v. *Board of Elections*, 380 F. 2d 445, 449 (2nd Cir.), cert. den., 398 U.S. 1048 (1967), Judge [now Chief Judge] Friendly saying:

> "But [not having a direct appeal to the Supreme Court] is hardly of great moment in view of the immediate availability of certiorari to the Court of Appeals and the likelihood of this being granted in the event the Supreme Court thinks a constitutional claim may have been erroneously rejected."

The limited area for the three judge court was further defined by Judge Kaufman in *Astro Cinema Corp., Inc.* v. *Mackell*, 422 F. 2d 283, 298 (2nd Cir. 1970):

> "This is particularly so when the aim of § 2281 was to protect the States against declarations of unconstitutionality emanating from a single district judge. While it is true that plaintiff loses his direct appeal to the Supreme Court not only is that body capable of remedying any injustice through the device of certiorari, but the direct appeal provision, in context, seems far more likely to have been for the benefit of the state than the plaintiff." [5]

[5] In that case, we refused to remand for a three judge court even though we felt that the constitutional objections raised were "not clearly insubstantial" and even though we directed defendant therein to return to plaintiffs an allegedly obscene film which the

The easiest solution for the district judge, whenever the words "United States Constitution" or "Fourteenth Amendment" appear in a complaint, would be to relieve himself of two-thirds of the responsibility for the decision by requesting the convening of a three judge court. This would seemingly be the approach of the Fifth Circuit as declared in *Jackson* v. *Choate*, 404 F. 2d 910, 913 (1968), in which the Court believed that "unless it is determined that it was an open and shut case three Judges must pass on the merits even though it means that three more must do so again." The Court felt that it would be better to "constitute a three judge court and allow that court to determine initially" whether it should have been constituted. This Court recently declined to adopt this policy. A district judge should not feel that he is merely a rubber stamp or that he exercises his judgment at his peril. In *Heaney* v. *Allen*, 425 F. 2d 869, 871, 872 (1970), this Court said:

> "If a 3-judge Court is once assembled, the temptation to stay together is strong. Indeed, as pointed out in *Swift & Co.* v. *Wickham*, 230 F. Supp. 398, 410 (S.D.N.Y. 1964), appeal dismissed for lack of jurisdiction, 382 U.S. 111 (1965), aff'd. 364 F. 2d 241 (2nd Cir. 1966), cert. denied, 385 U.S. 1036 (1967), it is usually rather idle for three judges to waste time deciding whether they have been properly assembled, since the three judge court has ju-

---

defendant District Attorney had seized from plaintiffs, because it appeared that an injunction would not there have been an appropriate form of relief. So too here. The defendant School Board in its answer indicated that it favored supplying all children with textbooks, and that it had suggested to the voters that such action be taken. Under these circumstances, it is clear that declaratory relief would be sufficient in the event that the complaint had been meritorious. Furthermore, under *Rockefeller* v. *Catholic Medical Center*, 397 U.S. 820 (1970), it is now clear that where such relief is granted, there is no direct appeal to the Supreme Court, and, although we are not called on to decide the question herein, after *Catholic Medical Center*, it is dubious that a three judge court need be convened in any event where it is evident that injunctive relief will not be granted.

> risdiction in any event whereas a wrong decision to return the issue to a single judge can create all sorts of trouble. The Fifth Circuit practice thus means in effect not only that three judges will have been called together to decide a question that in fact was determinable by one but that an appeal will almost certainly be added to the Supreme Court's docket, an unfortunate burden on that overworked tribunal."

No disagreement is voiced with the Fifth Circuit's concern that "it takes judicial prescience of a Delphic order to say with certainty that the attack is insubstantial" [Jackson at p. 913], but the prophetess did not abstain from her prophecies because of doubt. She merely couched them [not unlike some court decisions] in terms that lent themselves to divers constructions. Therefore, although this case may not be "open and shut" [so few cases are], the decisions of the Supreme Court and other courts which are as analogous as possible to this case should be examined to ascertain whether they "foreclose the subject". If they do, we should avoid a procedure which will make for repetition. Of course, no two cases involving equal protection are alike as to facts and, were mere factual variation the test, all cases should be channeled to the Supreme Court on the chance that some distinguishing feature might be found. However, the Supreme Court reminds us that "[t]he Three-judge requirement is a technical one to be narrowly construed. *Phillips* v. *United States*, 312 U.S. 246, 251" *Bailey* v. *Patterson*, 369 U.S. 31 at 33 (1962). See also *Goldstein* v. *Cox*, 396 U.S. 471 (1969); *Rockefeller* v. *Catholic Medical Center*, supra; *Gunn* v. *University Committee*, 399 U.S. 383 (1970). We believe that a review of the Supreme Court's decisions in related situations justifies affirmance of Judge Travia's opinion and our own in not remanding to a three judge court.

Our function is not to enact laws for the State of New York or to tell the Legislature how better they could have legislated. We are restricted to making an examination of the law as actually enacted and to declaring whether there is a reasonable basis for this classification.

Any state-created classification which is attacked as a denial of equal protection must be examined against either of two constitutional standards: [A] that the classification is rationally related to a legitimate state end [see *McDonald* v. *Board of Elections*, 394 U.S. 802, 809 (1969); *McGowan* v. *Maryland*, 366 U.S. 420 (1961)]; or [B] that the classification is justified by a compelling state interest. See, e.g. *Shelton* v. *Tucker*, 364 U.S. 479 (1960).

Judge Travia applied standard [B] and found a compelling state interest [319 F. Supp. at 278]. The legislative purpose behind § 701 indicates that the Legislature sought to promote education in the fields of science, mathematics and foreign languages—an end which could be accomplished through the furnishing of textbooks in the grades which covered those subjects [seven through twelve]. Judge Travia therefore reasoned that whichever standard is applied is of little consequence because the legislative scheme is reasonable; it is buttressed by compelling state justifications; and it is not tainted with the slightest hint of invidious discrimination.

Supreme Court decisions would indicate that standard [A] is also appropriate in cases such as this.

In *Dandridge* v. *Williams*, 397 U.S. 471, 484 (1970), the Supreme Court stated that "[I]f the classification has some 'reasonable basis' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some equality.' *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U.S. 61, 78." There, the State of Maryland had "to reconcile the demands of its needy citizens with the finite resources available to meet these demands." *Dandridge*, at p. 472. The Court recognized that in the area of economics and social welfare, even where such legislation involves "basic economic needs of impoverished human beings," "the Fourteenth Amendment gives the federal courts no power to impose upon the State their views of what constitutes wise economic or social policy." Dandridge, at pp. 485, 486.

This proposition has long been accepted by the Supreme Court. In *McGowan* v. *Maryland*, supra, 366 U.S. at 426, the Court said:

> "Although no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests upon grounds wholly irrelevant to the achievement of the State's objectives . . . A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."

Similarly, in *McDonald* v. *Board of Elections*, 394 U.S. 802 (1969), the court [Warren, Chief Judge] said:

> "Though the wide leeway allowed the States by the Fourteenth Amendment to enact legislation that appears to affect similarly situated people differently and the presumption of statutory validity that adheres thereto admit of no settled formula, some basic guidelines have been firmly fixed. The distinctions drawn by a challenged statute must bear some rational relationship to a legitimate state end and will be set aside as violative of the Equal Protection Clause only if based on reasons totally irrelevant to the pursuit of that goal. Legislatures are presumed to have acted constitutionally . . . and their statutory classifications will be set aside only 'if no grounds can be conceived to justify them [citations omitted].' With this much discretion, a legislature traditionally has been allowed to take reform 'one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind.' *Williamson* v. *Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 489 (1955); and a legislature need not run the risk of losing an entire remedial scheme simply because it failed, through inadvertence or otherwise, to cover every evil that might conceivably have been attacked. . . ."

Consistent with this theory, in *Briggs* v. *Kerrigan*, 431 F. 2d 967, 969 (1st Cir. 1970), aff'd. 307 F. Supp. 295 (D. Mass. 1969), the Court approved of a Boston practice of giving free lunch only to children in the secondary

grades, citing "the wisdom of the remainder in *Dandridge* that the Fourteenth Amendment does not require the government either to attack a program in its entirety or not at all." With limited resources, the reason for mandating textbooks only for children in the upper grades is made apparent by the following statement of purpose which accompanied the passage of § 701 by the New York Legislature:

> "The security and welfare of the nation require the fullest development of the mental resources and skills of its youth. This calls for more adequate educational opportunities and increased efforts to educate more of the talent of our nation and requiring the correction of those imbalances in our educational programs which have led to an insufficient proportion of our population educated in the fields of science, mathematics, foreign languages and other non-sectarian subjects. . . . It is hereby declared to be the public policy of the state that the public welfare and safety require that the state and local communities give assistance to educational programs which are important to our national defense and the general welfare of the state" [Laws of 1965, Ch. 320, Sec. 1].

In the opinion of the Legislature, the goals sought to be achieved were best realized by supplying books during the years in which the specified subjects principally were taught. Sound argument can be made that children in the formation years in grades one to six should have books and of a value far in excess of $7.50 if a maximum of educational opportunity is to be achieved. However, the Legislature was not required to address itself to this argument where the action it did take was clearly justified in terms of the goals it sought thereby to advance. Thus, plaintiffs' first claim does not raise a substantial constitutional question, the answer to which is not to be found in Supreme Court precedential guidance.

The second claim made by plaintiffs, that they were subjected to an unfair burden in that they could not have books unless the voters approved is clearly foreclosed by *James* v. *Valtierra*, —— U.S. —— (April 26, 1971).

That case involved a California statute which provided that low-income housing could not be built without voter approval. As the dissenting opinion there pointed out "[p]ublicly assisted housing projects designed to accommodate the aged, veterans, state employees, persons of moderate income, or any other class of citizens other than the poor, need not be approved by prior referenda." However, the Supreme Court approved this arrangement because "referendums demonstrate devotion to democracy, not to bias, discrimination, or prejudice." Section 701 does not make any such differentiation based on the income level of the proposed recipients but instead draws the lines according to grade level.[6] Thus, clearly this law is a valid means by which New York leaves some control over the school budgets to the voters of the affected school districts.

The claim that § 701 discriminates against indigents is also without merit. Insofar as this claim suggests that the State should rearrange its scheme for financing public school education so as to obviate the necessity for voter approval of funds for textbooks for primary school children, it is precluded by *Valtierra* for the reasons stated above.

At oral argument, plaintiffs did not press any broader attack on New York's failure to provide textbooks, conceding that if New York had not provided textbooks to

---

[6] The enactment of § 701 provided public funds for textbooks of children in private and parochial schools for the first time in the modern history of New York State. The passage of § 701 resulted in large part from pressure from those whose children attended these schools and in the face of substantial constitutional challenge on church-state grounds, which challenge was rejected in *Board of Education* v. *Allen*, 392 U.S. 236 (1968). It is not unlikely that the legislature felt that funds supplied to children attending private schools should be subject in part to voter acceptance of local school budgets, just as are portions of the funds going to public school children. Thus, persons who would otherwise have no stake in the school budget because their children attended non-public schools were given such a stake, and the difficulties involved in habitual opposition to school budgets from those with no stake in such budgets were lessened. So delicate complex and fair a political balance should not be the subject of rearrangement by the federal courts.

students in the secondary grades, their contentions would fail. The amicus raises a broader question which is hinted at by the plaintiffs in their brief: that wherever the State undertakes to provide education,[7] there is a duty to provide free textbooks.[8]

Given that it is clear that the State was privileged to assign to the School District the task of financing textbooks used in the lower grades and that it was privileged to assign the voters of such School District the task of deciding whether or not to supply the funds for such textbooks, the only remaining question is whether the voters were privileged to deny such requests for funds while still endeavoring to provide an education for the students of the District. The argument that they were not so privileged is based on two related lines of case law. The first is that group of cases providing indigents, especially indigents accused of crime, access to the Courts and free

---

[7] Since there is no affirmative federal constitutional duty for the States to provide education to its students duties imposed on the States are imposed on the basis of a finding that the state is discriminating invidiously in the way it conducts such education as it chooses to provide. *Brown* v. *Board of Education*, 347 U.S. 483 (1954); *Griffin* v. *Prince Edward Co. School Board*, 377 U.S. 218 (1964).

[8] From a procedural point of view, it is clear why plaintiffs have not pressed this contention. The complaint asks only that § 701 be declared unconstitutional and its enforcement enjoined, but that section in no way prevents the School Board from providing textbooks and § 703 specifically authorizes the voters to assess a tax for such purpose. If it is a constitutional requirement that schools provide children with free textbooks where the children are being provided a free education, it is not the State statute that is offensive but rather the legislative action of the voters of the School District in failing to do that which is allegedly constitutionally required, for surely if the voters of all School Districts in the State subject to §§ 701 and 703 approved taxes for textbooks, no constitutional violation under this third theory could be claimed. Thus, this theory is actually an attack on a local act and is not properly the subject of a three judge court regardless of its merits. Furthermore, in order to properly raise this question, plaintiffs would also have to amend their complaint to attack the constitutionality of the voters' action.

legal counsel.[9] The reasoning of these cases is that the State is required to provide these services and access because to do otherwise would be to deprive indigents of due process. Obviously, though, due process is not involved here. The other more general line of cases relates to the Equal Protection Clause. These cases, which are strictly limited in their scope, all deal with conditioning the exercise of some fundamental right on the payment of money, or forfeiture of benefits otherwise available, without a showing of "compelling state interest."[10] These cases are inapplicable here for although education is no doubt an area of fundamental importance, the Supreme Court has made clear its view that in the area of social welfare, the "compelling state interest" theory does not apply even though basic needs may be involved.[11] Plaintiffs suggest that *McMillan* v. *Board of Education*, supra, held that question involving the right of poor people to educational services presents substantial constitutional issues. In that case, brain damaged children who could afford private school tuition of approximately $3000, who gained admission to such schools and actually attended them, received a grant from New York in the amount of $2000; other brain damaged children received special public education, at a cost well in excess of $2000. Plaintiffs could not gain entry to the public schools because of a waiting list

---

[9] See e.g. *Boddie* v. *Connecticut*, 401 U.S. 371 (1971); *Griffin* v. *Illinois*, 351 U.S. 12 (1956); *Burns* v. *Ohio*, 360 U.S. 252 (1959); *Smith* v. *Bennett*, 365 U.S. 708 (1961); *Gideon* v. *Wainwright*, 372 U.S. 335 (1963).

[10] See e.g. *Shapiro* v. *Thompson*, 394 U.S. 618 (1969) [right to travel guaranteed by privileges and immunities clause may not be conditioned upon the forfeiture of welfare benefits]; *Tate* v. *Short*, 401 U.S. 395 (1971) [right against deprivation of liberty without due process may not be conditioned upon payment of a fine where no jail sentence imposed and person unable to pay fine]; *Harper* v. *Board of Elections*, 383 U.S. 663, 669-70 (1966) [right to vote guaranteed by fourteenth and fifteenth amendments may not be subjected to poll tax even where twenty-fourth amendment is inapplicable.]

[11] Certainly, no one would contend that a student's need for textbooks is any more fundamental than such items as food and clothing which are provided through welfare grants.

and could not afford the private school tuition differential. The Court felt that the fact that indigents received nothing from the program while others received large sums in cash or equivalent services was sufficient to justify a remand to a three judge court, although the Court thereby remanding was "not suggesting that [the issues] will necessarily be resolved in plaintiff's favor."

However, that Court expressly recognized that the State was under no constitutional duty to provide any grants whatever to such students, and that it could remove constitutional doubts merely by providing $2000 grants to all children similarly affected. Here all similarly situated students are being treated alike; no public money whatever is being spent in the School District for the provision of textbooks to children in the primary grades. It is undisputed that such money as the School Board has to spend is being spent in such a way as to benefit all students [i.e. on teachers' salaries, building maintenance and the like].[12] In *McMillan* had $2000 grants been made to all students not attending public schools, which the *McMillan* Court felt would remove constitutional doubt from the statute, those who spent the additional money and attended private schools would receive a better education. Similarly, in this case those who can afford textbooks will also no doubt receive a better education than those who cannot but that is because they had the financial means to supplement that which the State provides and not because the State has provided them with more than has been provided plaintiffs.[13]

Unless the courts are to take over legislative functions and to decree that all children in all grades are to have free textbooks, the judgment of the Legislature should control. That judgment was not exercised in an arbitrary

---

[12] Plaintiffs were of course given the benefit of such instruction notwithstanding that they did not rent textbooks. Compare *Byrd* v. *Sexton*, 277 F.2d 418 (8th Cir. 1960) [Blackmun, Judge] [student excluded from public school for failure to pay enrollment fee denied federal relief].

[13] Plaintiffs ignore the impact of the welfare benefits they receive, which under the applicable federal statute and *United States* v. *Wyman*, supra, should be adequate to cover this type of expense.

and unreasonable manner. Although the Legislature differentiated between two groups of grades in its allotment, the discrimination cannot be characterized as "invidious". Upon the record and the decisions relating to the appointment of three judge courts and upon the merits, Judge Travia acted properly in denying the convening of a three judge court and in dismissing the complaint.

Affirmed.

KAUFMAN, Circuit Judge (dissenting):

I dissent and would hold that plaintiffs have established at the very least a substantial claim that as applied in the Union Free School District No. 20, Town of West Hempstead, where their children are enrolled in the public schools, New York Education Law § 703 deprives indigent children of the equal protection of the laws.[1]

Despite the tone and intimations in the lead opinion's discussion of the appropriate standard for convening a three-judge court, I understand Judge Moore ultimately to agree that we are indeed bound on this appeal to inquire no further should we find a "substantial" claim made out, *Idlewild* v. *Bon Voyages Liquor Corp.* v. *Epstein*, 370 U.S. 713, 715 (1962), viz. one not virtually

---

[1] In *Boddie*, the argument found decisive by the district court and by the majority here—that the state has primary responsibility for deciding how to spend limited resources—was explicitly considered and rejected. I agree that *McInnis* v. *Shapiro*, 293 F. Supp. 327, 336 (N.D. Ill. 1968) (decided by a three-judge court), aff'd 394 U.S. 322 (1969) (per curiam) and *Dandridge* v. *Williams*, 397 U.S. 471 (1970), among the cases cited by the majority render insubstantial plaintiffs' subsidiary theories that New York discriminates between elementary school students and those in higher grades by providing only the latter with free books, or by conditioning free books for the former only on a vote of the electorate. Unfortunately, discussion of these insubstantial arguments consumed the entire opinion of the district court below and also claims the preponderance of the discussion of the majority here. But the essence of plaintiffs' case is discrimination between poor children in elementary schools without books and their more affluent classmates who can afford texts. The limited resources argument is no more availing to answer that claim than it was in *Boddie*—or *Griffin*, *Douglas*, and *Harper*, *infra*.

"foreclosed" by controlling precendent, *California Water Service Co.* v. *City of Redding*, 304 U.S. 252, 255 (1938). Nor do I interpret my own opinion in *Astro Cinema Corp, Inc.* v. *Mackell*, 422 F. 2d 293, 298 (2d Cir. 1970), declining to convene a three-judge court to evaluate plaintiffs' "futile" request that an impending criminal prosecution be enjoined, which the panel found "completely unwarranted," as in any sense suggesting that we are empowered to decide more at this juncture than whether plaintiffs' claim is "substantial."

Nevertheless, it is appropriate to analyze further the interesting question raised by the majority as to the relation between the three-judge court statute applicable here, 28 U.S.C. § 2283, [sic] and considerations of judicial economy. While I do not question the majority's arithmetic, I do suggest that the implication that over the long term, applying a stricter standard on review of a decision refusing to convene a three-judge court will consume fewer judges' energies amounts at best to a self-fulfilling prophecy. The lead opinion overlooks that convening a three-judge court in the first instance, because it bypasses the normal appellate level, can be expected for that reason to involve fewer judges in the ultimate disposition of a case than does a refusal to convene such a court. Not only will two fewer appellate judges then pass on the merits than otherwise (there will be only one additional district judge)—assuming an appeal would have been taken from a district court judgment refusing to convene a three-judge court—but the possibility of full in banc consideration at the appellate level is avoided. Nor is this the end of the matter, for the majority's own analysis of the large number of judges necessarily drawn in when an application for a three-judge court is improperly denied, far from supporting a stricter standard than that established by precedent, leads to the conclusion that the "substantial claim" test may lead to the most efficient operation of the three-judge court scheme as presently constituted. I agree with Judge Moore, as I said in *Astro-Cinema*, that the primary purpose of this three-judge court statute is to prevent a single judge from interfering with a state's

governmental operations. But the implication of this is not, as one might at first impression suppose, that it is futile to convene a three-judge court other than to ratify a single district judge's own conclusion that a state statute is indeed unconstitutional. If district court did apply that harsher standard, there would inevitably be a higher percentage of reversals on appeal, and thus a greater waste of judicial resources.

This is not to say that the three-judge district court procedure remains the desirable and efficient procedure envisioned when Congress provided for it. At least for administrative reasons and perhaps because of more basic flaws in its structure as well, it is often in practice costly, cumbersome and time-consuming, particularly in the face of the great increase in the volume of cases in appellate courts and the corresponding influx of demands for three-judge courts. But until Congress overhauls the system, I believe judges should not in their frustration yield to the temptation to legislate their own solutions [a principle rigorously adhered to by the author of the lead opinion in the past, see *Caplin* v. *The Marine Midland Grace Trust Co.*, 439 F. 2d 118 (1971)], especially, as here, when the judicial statutory amendment is as likely to increase burdens and delays as to alleviate pressures. The test is and should remain—is there a substantial claim?

On the merits, it is difficult to square the majority's conclusion that the claim presented in this case is not substantial with its admission that "education [is] an area of fundamental importance" and its recognition of binding precedent requiring the state to demonstrate a "compelling state interest" to justify conditioning the exercise of fundamental rights or the enjoyment of fundamental "privileges" upon the payment of money. The majority also concludes that the plaintiffs "realistically" describe the situation of their sons and daughters when they portray "[i]ndigent children sitting bookless, side by side in the same classroom with other more wealthy children learning with purchase[d] textbooks," a situation that inevitably "engenders a widespread feeling of inferiority and unfitness in poor children and is psycho-

logically emotionally and educationally disastrous to their well being." No authority supports the melancholy conclusion that plaintiffs children, severely handicapped relative to their more affluent classmates solely by the operation of the statute complained of, are deprived of equal protection.

The ideal of education in our society is to free men and women to pursue their own lives more fully. Economic and social mobility, cultural richness and diversity, the inheritance of arts, skills, thoughts and values, the strong and flexible operation of democratic political processes, the growth and function of private institutions and associations, the habits, structures, virtues and idiosyncrasies that make our society unique and coherent take root in formal and informal education. In New York State, as elsewhere in the United States and in most other developed countries, the government has arrogated to itself responsibility for administering and enforcing a formal and public system of education. It has done so both by the requirement of law that all children receive schooling until they reach a specified age and by providing schools, free to their users, supported by tax revenues. Courts have been alert to the potential for unwarranted incursions by the states into constitutionally protected spheres of individual liberty—which are nothing less than rights to self-education and self-direction—inherent in compulsory and public education. They have also rightly viewed with skepticism and suspicion state action that has resulted in systematic inequality between the quality of public education offered different classes of children.

The capstone of cases recognizing and protecting children's rights against over-zealous state attempts to regulate their lives beyond constitutional bounds is the recent decision of the Supreme Court in *Tinker* v. *Des-Moines School Dist.*, 393 U.S. 503, 514 (1970) counting freedom from unjustified prior restraints of speech and expression among the "fundamental rights which the state must respect" in administering their public schools. Id. at 511. The majority opinion in this case is inconsistent with the philosophy of *Tinker* and its predeces-

sors, see *Meyer* v. *Nebraska*, 262 U.S. 390 (1923); *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925), as expressed in *West Virginia* v. *Barnette*, 319 U.S. 624 at 637, quoted in *Tinker*, 393 U.S. at 507:

"The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures—Board of Education not excepted. These have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights. That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes." Unless inequality based on wealth is a principle of our government, I am unable to reconcile these words with today's opinion.

Nor are the words of the fountainhead of parallel and complementary precedent guaranteeing equal educational opportunity without the vestige of invidious discrimination, *Brown* v. *Board of Education*, 347 U.S. 483, 493, any less incompatible with the majority's resolution of this case:

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide

it, is a right which must be made available to all on equal terms.

Despite this, the defendants have admitted in their formal answer in this litigation that plaintiffs' children are not offered an education on terms equal to those of other children attending the same schools whose parents happen to be wealthier than are theirs. In evaluating the adequacy of the present complaint to support impaneling a three-judge court, we must accept as true its averment that because the voters in plaintiffs' school district refused to provide, as they were empowered to do, free school books to children in grades one through six of their public schools, or at least to those whose parents cannot afford to rent them, plaintiffs' children must attend school without the aid of textbooks provided to other children in the same schools and same grades whose parents can afford the rental fee charged by the state for their use. See *Boddie* v. *Connecticut*, 401 U.S. 371, 373 (1971). Defendants have admitted that "textbooks . . . are essential to a quality educational program and a necessary and basic tool in the education of youngsters."

Curricula not keyed to textbooks are advocated by some educators and have been put into practice in some private and public schools. But defendants do not dispute that New York's own public education system continues to rely extensively on the traditional method of teaching from texts. Children without the benefit of these texts, one must imagine and as affidavits before us aver, are afforded a markedly inferior education during their early years of schooling than are their non-indigent peers. The psychological and social impact of the badge of inferiority implied by their disfavored treatment must extend far beyond the classrooms and aggravate to an incalculable degree other disadvantages these indigent students must in our society inevitably struggle against as a result of the financial straits of their parents. The enduring lesson they are thus taught in the public schools they attend without books is that wealth breeds favored treatment while disadvantage leads on to still greater handicaps.

In short, the legislative scheme here creates two classes of children, not physically separate yet unequal—the poor suffer while the rich receive the full benefits of the state's educational program. But "[l]ines drawn on the basis of wealth or property, like those of race . . ., are traditionally disfavored." *Harper* v. *Virginia Bd. of Elections*, 383 U.S. 663, 668 (1966).

In *Boddie* v. *Wyman*, 401 U.S. 371 (1971), decided this term, the Court struck down a Connecticut statute that required the payment of an average $60 in court fees and costs as a prerequisite to obtaining a divorce on the ground that the fees effectively barred some indigents from dissolving their marriage contracts. The fees required by New York here as a prerequisite to the distribution of textbooks, according to evidence presently in the record, range from $6.00 to $58.50 per household, and effectively bar plaintiffs' children from receiving an adequate public education.

The majority attempts to dismiss *Boddie* in a footnote by labelling it a "due process" rather than an "equal protection" case. But *Boddie* is grounded on the "basic position of the marriage relationship in this society's hierarchy of values." Only "through the looking glass" might one rank a child's interest in education lower on the scale of this nation's traditional values than an adult's interest in a divorce.

The majority's similar disposal of *Griffin* v. *Illinois*, 351 U.S. 12 (1956) in the same footnote with *Boddie* as only another "due process" case is even more unavailing, for that decision rested by its own language squarely on the equal protection guarantee, as well as on due process, holding that a state may not deny a free transcript to an indigent where necessary to take a direct appeal from a criminal conviction. The court's observation in *Griffin* that "[i]n criminal trials a State can no more discriminate on account of poverty than on account of religion, race, or color," id. at 17, applies with equal force to the fundamentally important institution of public education. See also *Douglas* v. *California*, 372 U.S. 353, 355 (1963). Failure to appoint free counsel for an indigent's first appeal as of right from state criminal

conviction is unconstitutional "discrimination against the indigent."

Entirely apart from Supreme Court precedent, today's decision is strikingly inconsistent with a recent decision of this court. *McMillan* v. *Board of Education*, 430 F. 2d 1145 (2d Cir. 1970), requiring that a three-judge court be convened to consider plaintiffs' claim that their poverty would not permit them to take advantage of the state's offer to pay $2,000 toward the tuition of special private schools for handicapped children. Plaintiffs in *McMillan* alleged they were ineligible for the stipend because they could not afford the difference between the grant and full tuition. *McMillan* was a less compelling case than is this one for convening a three-judge court, since the state's usual public education facilities were open to plaintiffs' children on an equal basis with other children. In *McMillan*, the students were unable to make full use of these facilities because of their own physical handicaps. Here the state itself has artificially handicapped indigent children by denying them school books provided to others who can afford them.

It will not do to say, as does the majority, that in this case "public funds are distributed equally." The same argument would apply if schools charged a toll to defray the cost of operating public school buses. Were indigent children denied entry to the bus that passed their doors each morning because they could not bear their share of the cost—and thus were barred from public schools attended by their richer neighbors—would the answer also be "equal expenditures and an offer on equal terms to each child is sufficient"?

Here, as in *McMillan*, the essence of the claim is unequal educational opportunity based on wealth. The state has not justified the inequity sufficiently to warrant the refusal to convene a three-judge court.

LETTER FROM HELEN SERENSKY, PRINCIPAL TO PARENTS, Dated August 31, 1970 (Appended to Plaintiffs' Complaint)

MARIAN DELANEY PRIMARY SCHOOL
307 EAGLE AVENUE
WEST HEMPSTEAD, N. Y. 11552

August 31st 1970

Dear Parents

I am hopeful that your summer has been a most happy and healthy one.

As you have been advised, we are now operating on an austerity budget. I am enclosing the necessary information you will need to ascertain the fees that have been determined for your child's textbook rental, workbooks and other materials for the school year (1970-71).

I am also enclosing a note to your child and a small tag for him to wear to school.

Thank you for your cooperation.

Very truly yours,

HELEN SENESKY
Principal

HS;as
Encs.

FEE SCHEDULE—TEXTBOOK RENTAL—WEST HEMPSTEAD PUBLIC SCHOOLS (Appended to Plaintiffs' Complaint)

West Hempstead Public Schools
West Hempstead, N. Y. 11552

The fees per pupil in the elementary schools for the school year (1970-1971) for textbooks, workbooks, other materials and supplies for the various grades are shown below:

	Text-books (rental)	Work-books	Duplicating Paper, Misc. Supplies	Materials	Total
Kindergarten	$ —	$3.00	$ —	$3.00	$ 6.00
Grades 1, 2, 3, 4	7.50	6.00	1.00	3.00	17.50
Grades 5, 6	7.50	4.00	1.00	3.00	15.50

Fees are due and payable on the first day of school. Payment by check is preferred. Checks should be made payable to *Treasurer, U.F.S.D. #27, West Hempstead.* Each teacher will issue receipts so separate checks should be made for each child. If sending check, or cash (exact amount) with child, please place in an envelope with child's name and room number on it.

Children will furnish their own general supplies: pens, pencils, erasers, etc.

aks

LETTER FROM BENEDICT J. VALENTINE, PRINCIPAL TO PARENTS (Appended to Affidavit of Plaintiff FORESTINE PRESSY)

CHESTNUT STREET SCHOOL

IV-1-8922

Dear Parents:

I am saddened, just as you, at the realization that we begin our new school year under an austerity budget. But begin we must, and we here at Chestnut Street are going to look past the admitted hardships of such a budget and work towards giving the children the very best education within our power.

School begins on Wednesday, September 9, 1970. For grades 3 and 4, this first day will end at 11:30, at which time the children will be dismissed.

Starting on Thursday, there will be two lunch periods. Fourth graders will eat from 11:25-12:15; third graders from 12:20-1:10.

Regarding kindergarten—the morning session starts at 8:45 and ends at 11:50. The afternoon session starts at 12:30 and ends at 3:00. At mid year the sessions are reversed. Please note, however, that *for the first eight days (Sept. 9-Sept. 18)* the following shortened hours are in effect:

AM session—8:45-10:30 PM session—12:30-2:00.

Your child has been assigned to AM
4th Gr. Room .... 3rd Gr. Room 116 Kgn. Room .... PM

All children will report directly to their classes *after* 8:30. We will have adequate personnel on hand to direct children who are not familiar with our floor plan.

If you should find this letter opened and resealed, it is because we had a different letter all prepared to send before the austerity budget changed our plans.

Enclosed you will find the schedule of fees required under an austerity budget.

Speaking for entire staff, I express a wish for a very fruitful and pleasant relationship during the coming year.

Cordially,

BENEDICT J. VALENTINE
Principal

BJV/ak
Enc.

86

SUPREME COURT OF THE UNITED STATES

No. 71-5685

DAISY JOHNSON, ET AL., PETITIONERS

v.

NEW YORK STATE EDUCATION DEPARTMENT, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

February 22, 1972

☆ U. S. GOVERNMENT PRINTING OFFICE: 1972 461269 610